

EXHIBIT 1

Page 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Lead Case No. 08-99000-smb

4 - - - - - x

5 Adv. Case No. 08-01789

6 - - - - - x

7 In the Matter of:

8

9 SECURITIES INVESTOR PROTECTION CORPORATION,

10 Plaintiff,

11 v.

12 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC, et al.,

13 Defendants.

14 - - - - - x

15 Adv. Case No. 10-04390

16 - - - - - x

17 In the Matter of:

18

19 IRVING H. PICARD, Trustee For The Liquidation of Bernard L.

20 Madoff Investment Securities LLC,

21 Plaintiff,

22 v.

23 BAM L.P., ET AL.,

24 Defendants.

25 - - - - - x

Page 2

1 Adv. Case No. 10-05383

2 - - - - - x

3 In the Matter of:

4

5 IRVING H. PICARD, Trustee for the Substantively
6 Consolidated SIPA Liquidation of Bernard L.
7 Madoff Investment Securities LLC and the Estate
8 of Bernard L. Madoff,

9 Plaintiff,

10 v.

11 SHAPIRO ET AL,

12 Defendants.

13 - - - - - x

14

15 United States Bankruptcy Court
16 One Bowling Green
17 New York, NY 10004

18

19 September 26, 2018

20 10:05 AM

21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: MATTHEW

Page 3

1 HEARING re Case No. 08-01789 Hearing on Order to Show Cause
2 Why October 4, 2016 Order Appointing Discovery Arbitrator
3 Should not be Amended

4

5 HEARING re Case No. 08-01789 Motion to Strike the Notices of
6 Withdrawal of claim and Notices of withdrawal of Objection
7 to Determination of Claim

8

9 HEARING re Case No. 10-04390 Pre-Trial Conference

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11 HEARING re Case No. 10-05383 Discovery Conference

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25 Transcribed by: Sonya Ledanski Hyde

Page 4

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. Good morning.

3 Madoff.

4 MR. CREMONA: Good morning, Your Honor. Nicholas
5 Cremona of Baker & Hostetler, appearing on behalf of the
6 Trustee. I have here with me my colleague, Anat Maytal and
7 Nathanael Kelley on behalf of Pacific.

8 Your Honor, there are two matters on the agenda
9 this morning. I would propose proceeding with the pretrial
10 conference in the Mann case, which is 10-04390. Just to put
11 it into context by way of background, Your Honor, this is a
12 case against Michael and Cheryl Mann and Bam, LP. This is a
13 case that has completed discovery as of February --
14 completed fact discovery as of February 2015 and completed
15 expert discovery as well.

16 There are also, I think, which is relevant to the
17 motion that we're going to discuss next -- but for Your
18 Honor's edification, there are claims filed on behalf of
19 both Defendants here and there are pending objections to the
20 Trustee's denial of those claims. And those objections were
21 filed in 2009.

22 THE COURT: Is this part of the motion to
23 withdraw? Why don't we deal with the motion to withdraw?
24 Because this is really the tail wagging the dog.

25 MR. CREMONA: Well, we can, Your Honor, but I

1 think --

2 THE COURT: In other words, you're telling me you
3 don't agree -- that you can't agree to summary judgment so
4 the case is trial ready, right?

5 MR. CREMONA: That's correct.

6 THE COURT: But then we get into the question of
7 where the case is going to be tried.

8 MR. CREMONA: Well, I think, Your Honor, that
9 question has been answered by Judge Daniels and he --

10 THE COURT: Why don't we deal with that motion
11 first? Because that's a gating issue really.

12 MR. CREMONA: Well, I think -- I don't think it is
13 because there's no motion to withdraw the reference. And
14 Judge Daniels has said that Your Honor has final
15 adjudicative authority to dispose of this matter as a final
16 matter based on the fact that there's a pending claim and a
17 pending objection, which is extant, and that was ruled upon
18 twice by Judge Daniels. So, I'm happy to proceed however
19 Your Honor sees fit.

20 THE COURT: Yeah, I'd like to hear that motion
21 first. Because there's no point scheduling a trial if I
22 don't have -- if they have a right to a jury trial and I
23 can't try it. Right?

24 MR. CREMONA: I understand that, Your Honor.

25 THE COURT: So, why don't you tell me about that

1 motion?

2 MR. CREMONA: Sure. The second matter, Your
3 Honor, is the Trustee's motion to strike certain claim
4 withdrawals and objections that were filed by the Chapman
5 firm and the Dentons firm on behalf of 52 total
6 defendant/claimants. The Trustee asserts or submits that
7 the motion should be granted for three principal reasons:
8 First, the attempted withdrawals are procedurally improper.
9 They violate Bankruptcy Rule 3006. They were done
10 unilaterally and without order or leave of this Court.

11 Second -- and this is just briefly -- I'll get
12 into each of these in more detail.

13 THE COURT: Well, but they're going to argue that
14 -- they'll just withdraw their objections, which under Rule
15 3006, they don't need any --

16 MR. CREMONA: That's my next point, Your Honor. I
17 think if you --

18 THE COURT: -- any permission.

19 MR. CREMONA: Sorry, sorry.

20 THE COURT: Go ahead.

21 MR. CREMONA: If you -- putting aside the
22 procedural definition. So, if you then look to Rule 41,
23 which is what courts have looked to to determine whether you
24 can make that -- such a withdrawal under Rule 3006. Rule
25 41, the standard there cannot be met here because of the,

Page 9

1 among other things, the prejudice that would result in the
2 net loser victims, and there are a number of other factors
3 that the Second Circuit enumerated, and we can go through
4 them each in the Zagano case.

5 THE COURT: What's the prejudice to the net
6 losers?

7 MR. CREMONA: I think one very illustrative
8 example is demonstrated by three of the cases that are
9 subject to the motion. That's the Saran Lawrence and
10 Nelsons cases. If Your Honor will recall, we were here last
11 May -- May 31 for a pretrial conference. Then you gave --
12 you scheduled -- Your Honor scheduled trial in October,
13 provide --

14 THE COURT: May 31 of 2017?

15 MR. CREMONA: Yes. And -- I'm sorry if I
16 misspoke. And Your Honor provided sufficient time for -- a
17 motion to withdraw was filed in June. That wasn't
18 determined by Judge Daniels until May of this year, and then
19 a reconsideration motion was filed, determined now on
20 September 11th of this year.

21 So now we are here 15 months after that, and I
22 think that's a significant delay. It precludes us from our
23 ultimate goal and our ultimate duty, which is to bring
24 forward these cases to resolution --

25 THE COURT: But I can't do anything about that

Page 10

1 delay. That's -- that's done. You know, going forward,
2 what's the prejudice? In other words, if I allow them to
3 withdraw the claim, and that leads to the conclusion that I
4 lack equitable jurisdiction, which is a separate issue --

5 MR. CREMONA: Mm hmm, understood.

6 THE COURT: -- and they get to try their case in
7 District Court, what's the -- what's the prejudice?

8 MR. CREMONA: I do think delay is a significant
9 factor, Your Honor, because the only way that that occurs --

10 THE COURT: What's the evidence of delay, though?

11 MR. CREMONA: The procedural posture of the case
12 is. We have now four cases that are trial-ready. What
13 would have to happen for those not to go forward before Your
14 Honor is a motion to withdraw the reference, which would add
15 15 months onto each of those cases. And that's going to
16 happen seriatim and then we can never accomplish the goal,
17 as I said, which is to resolve these cases and get the net
18 loser victims their -- their principal that they haven't yet
19 received.

20 But I think, you know, I'm happy to go through the
21 other Zagano factors as well, which I think militate in
22 favor of granting the Trustee's motion. And that is -- you
23 know -- well, again, so if you look at the Zagano factors,
24 Your Honor, the question becomes the diligence in bringing
25 the motion or the filing; the extent to which the suit has

Page 11

1 progressed, or here, the claims process; the effort and
2 expense that has been incurred; and duplicative expense in
3 re-litigation and the adequacy of the Plaintiff's
4 explanation. Or here I would say the claim.

5 So, diligence, if we start there, Your Honor,
6 we're ten years into this liquidation. This withdrawal was
7 unilaterally filed on the heels of Judge Daniels' decision.
8 That can't not -- that cannot be ignored. That decision was
9 issued on, as I said, May 15 of this year. These filings
10 occurred on June 1, again on June 29, and then again in
11 July.

12 It was clearly an effort, I would submit, to avoid
13 this Court's equitable jurisdiction, and it was directly in
14 response to Judge Daniels' decision, which said the claims
15 are pending, the objections are pending, they are live. And
16 I'm happy to go through the claims process. I know Your
17 Honor is intimately familiar with that. But those facts
18 rendered Your Honor with final adjudicative authority to
19 dispose of these adversary proceedings. And, again, we're
20 back to delay.

21 Because if Your Honor is able to do that, we can
22 expeditiously go to trial and get these pieces resolved. If
23 Your Honor does -- does something which I would respectfully
24 submit would be inconsistent with the directives of Judge
25 Daniels, then there's an enormous delay. And, again, those

Page 12

1 are just two of the factors. I think, you know, the
2 adequacy of the explanation for the withdrawal -- I mean, to
3 me, it is quite clear, as I just articulated, that I would
4 go so far as to say it's gamesmanship. The timing and the
5 withdrawal are clearly an effort to circumvent this Court's
6 jurisdiction.

7 There's been a clear and significant effort in
8 prosecuting the claims process, and we should discuss that a
9 moment, Your Honor. I know Your Honor is intimately
10 familiar with the claims and objections and the way that we
11 -- the Trustee has disposed of those. Just this week you
12 entered the 21st omnibus order.

13 All along in this process the Trustee has disposed
14 of or -- or sought affirmation of his prior determinations
15 by Your Honor because there were no legal issues remaining,
16 and all of those issues were finally resolved. These cases
17 are quite different, Your Honor. And you'll note that in
18 none of those 21 prior motions was there ever a defendant
19 included that had a claim because the proper place for the
20 resolution of that -- those claims issues, which are
21 inextricably intertwined with the avoidance liability, as
22 Your Honor has recognized in the Cohen decision, which was
23 articulated by Judge Rakoff -- we are bound by that.

24 As such, the Trustee has specifically delayed --
25 well, not delayed. We are waiting until we can resolve

Page 13

1 these all in one forum, which is the directive from the
2 District Court. Now, we have it once from Judge Rakoff.
3 Your Honor has implemented that. Now we have it twice more
4 from Judge Daniels, and I would submit that to do something
5 inconsistent with that is -- is ignoring the precedent and
6 the law in this case.

7 THE COURT: Let me just stop -- their argument is
8 "Look, we're going to withdraw our claims. So there's no
9 claims resolution process remaining for our claims." That's
10 their argument.

11 MR. CREMONA: I understand. I think that -- that
12 -- there are a number of problems with that, Your Honor, a
13 lot of which I just described. That would be embracing
14 procedural gamesmanship, it would be disregarding the law
15 that says when you submit a claim, you've now submitted to
16 the Court's equitable jurisdiction.

17 THE COURT: For the claims -- for the claims
18 resolution process.

19 MR. CREMONA: Right. But when the claim that
20 requires resolution is inextricably intertwined with the
21 avoidance liability, which we know from Judge Rakoff is the
22 case here. One -- and I think Your Honor acknowledged, you
23 cannot divorce the claims liability --

24 THE COURT: I understand all that, Mr. Cremona.

25 MR. CREMONA: Okay.

Page 14

1 THE COURT: But what they're saying is there's no
2 longer a claims resolution process because they're
3 withdrawing their objection or they're withdrawing their
4 claim.

5 MR. CREMONA: Okay, but, Your Honor --

6 THE COURT: So, why don't you address that issue?

7 MR. CREMONA: Sure. I think, again, there are a
8 number of ways to address that. We have here a contested
9 matter based on the objection that was filed to each of the
10 claims. If you look to the claim that was filed and appended
11 to the Dentons' objection, in Paragraph 24, they
12 specifically say that they want the rights accorded to a
13 contested matter under 9014, including discovery.

14 So it's not just a ministerial act of withdrawing
15 a claim; there is a conjoined contested matter --

16 THE COURT: Well, there can be conditions to the
17 withdrawal.

18 MR. CREMONA: I suppose there could, Your Honor,
19 but I think --

20 THE COURT: I'll ask them about that but...

21 MR. CREMONA: Okay. I would submit that the time
22 to do that has now since passed. And to allow it to occur
23 would be directly contravening Judge Daniels' decision.
24 These very same issues were put before him and he ruled that
25 Rule 30056 renders these withdrawals ineffective. And, as

Page 15

1 such, they remain pending. And they do remain -- and as we
2 articulated in the declaration of Segal, all of those
3 objections that are the subject of this motion have not been
4 disposed of for the very reasons I just articulated in the
5 claims process.

6 And to answer your question further, I think to
7 allow them to just simply withdraw it now is to contravene
8 the claims procedures order, it is to disregard the entire
9 claims process that we've utilized over the last nine-plus
10 years. And, again, I do think that we have to stand on
11 principle and the law that you can't on one hand invoke this
12 Court's jurisdiction and then disavow it when it's suitable
13 to your client. I mean, that is just -- that's exactly
14 what's happening here. And I would submit that that is
15 totally inappropriate. And as a result, the claims should
16 be stricken.

17 And the other point, I think, Your Honor, which I
18 haven't yet made -- and we make it in our papers, is that,
19 again, I've said that the claims are inextricably
20 intertwined with the avoidance liability. But I think it's
21 important to point out too that when you look at the
22 objections that are attached and filed, and the affirmative
23 defenses in the answer, they are at the core the same
24 issues. And, again, it would be inefficient to resolve them
25 separately. The opportunity to do so has passed.

Page 16

1 THE COURT: But, you know, you keep saying that,
2 but they're saying, "Look, you've resolved the claims. It's
3 zero."

4 MR. CREMONA: But that -- well, again, if we look
5 at 502D and the decision from Judge Rakoff, it applies here.
6 There is a pending claim and you can't resolve the claim
7 until your avoidance liability has been established with
8 finality.

9 THE COURT: But you're saying we're not -- okay, I
10 got it. Go ahead.

11 MR. CREMONA: I mean, Your Honor, do you have any
12 further questions that you'd like --

13 THE COURT: No, no. Let me hear from the other
14 side. Yes, sir?

15 MR. KELLEY: Yes. If I may, I'm Nathanael Kelley
16 for the Securities Investor Protection Corporation. I'll
17 just state briefly that we invoked to address the
18 applicability of the federal rules of bankruptcy procedure
19 to this SIPA liquidation. And we were, frankly, a little
20 surprised that that was an issue but --

21 THE COURT: Well, Judge Daniels really decided
22 that in that Footnote 3, so I'm not even going to consider
23 that.

24 MR. KELLEY: Sure. And regarding the
25 applicability of the -- regarding their attempt to withdraw

Page 17

1 their objections, just I'd like to point out that it --
2 filing the objections initiated a contested matter, which
3 under Rule 9014, the federal (indiscernible) Procedure 41 is
4 (indiscernible) and addresses that issue.

5 THE COURT: All right.

6 MS. NEVILLE: Good morning, Your Honor. Carol
7 Neville from Dentons on behalf of the Dentons customers. I
8 feel like I'm living in a parallel universe. The claims
9 procedure and the adversary proceeding are not inextricably
10 linked.

11 THE COURT: Well, but the fictitious profits issue
12 is the same thing as the net equity issue. It's --

13 MS. NEVILLE: Mm hmm. But that's not -- that's
14 not the resolution of the adversary proceeding.

15 THE COURT: No, I understand that.

16 MS. NEVILLE: This phrase, there's two sides to
17 the same coin, is their phrase, which Judge Rakoff was just
18 reciting. It's not --

19 THE COURT: Well, how does the computation of
20 fictitious profits differ from the computation of net
21 equity?

22 MS. NEVILLE: It doesn't.

23 THE COURT: Okay.

24 MS. NEVILLE: But that's not the end of the story
25 in the adversary proceeding. That was the case in the old

Page 18

1 equity receiverships and through the Ponzi scheme cases.
2 We've argued ad nauseam that that's not what the standard
3 for 548C is. But let me just -- let me just point out that
4 in the complaint --

5 THE COURT: But as a factual -- as a factual
6 matter, the computation of net equity and the computation of
7 fictitious profits are the same under the case law.

8 MS. NEVILLE: Under the case law, but that doesn't
9 mean that the claims procedure in this case and the
10 adversary are inextricably linked. If you look at the
11 complaint, it doesn't say, "You filed a claim and we're
12 going to resolve it in connection -- on the same standard"
13 or anything else. On the contrary, it says, "We know you
14 filed a claim. We're going to resolve it in another
15 proceeding."

16 THE COURT: Right. So, if they win -- in other
17 words, if they can convince whoever decides this case that a
18 fraudulent transfer occurred, that claim is automatically
19 disallowed under 502D. All they have to do is, you know,
20 make a one-paragraph motion.

21 MS. NEVILLE: Well, normally --

22 THE COURT: So, and it will be resolved --

23 MS. NEVILLE: -- the 502D claim would be put in
24 here --

25 THE COURT: Well, it doesn't have to be. But --

Page 19

1 MS. NEVILLE: Well, let me just say --

2 THE COURT: In other words, you seem to be arguing
3 that they're splitting their cause of action somehow.

4 MS. NEVILLE: Well, they did. Because they went
5 up three times to the Second Circuit on the claims
6 resolution procedure.

7 THE COURT: Why are you withdrawing -- this is
8 really a question for both sides -- both parties. Why are
9 you withdrawing your claims now?

10 MS. NEVILLE: I didn't withdraw a claim. I
11 withdrew the objection to --

12 THE COURT: But how does that -- but how... As I
13 under -- as I recall the procedures order, if you don't file
14 an objection to the Trustee's determination within 30 days,
15 the claim is deemed disallowed, right?

16 MS. NEVILLE: Right.

17 THE COURT: Okay. You filed an objection, so the
18 withdrawal of your objection under the procedures order
19 doesn't lead to a deemed disallowance of your claim.

20 MS. NEVILLE: Well, let me just point out that for
21 nine years --

22 THE COURT: So you have to withdraw the claim.

23 MS. NEVILLE: -- we have gone up to the Second
24 Circuit three times and had rulings on each of the issues in
25 the objection. So what my argument is, is that there is

1 finality in the claims allowance procedure.

2 THE COURT: Could I -- could I allow you to
3 withdraw the claim... First of all, let me ask you a
4 question: You're withdrawing your claim with prejudice?
5 That would be the scenario.

6 MS. NEVILLE: I didn't withdraw the claims; I
7 withdrew the objections. That's a different --

8 THE COURT: So you're not withdrawing your claims?

9 MS. NEVILLE: The claim is sitting there. That's
10 why the motion is completely idiotic with respect to my
11 claim.

12 THE COURT: All right, so there's still a pending
13 claim?

14 MS. NEVILLE: There are still pending claims.

15 THE COURT: So, there's a pending claim that I
16 have equitable jurisdiction to try the answer --

17 MS. NEVILLE: But those claims have been finally
18 determined and disallowed.

19 THE COURT: When?

20 MS. NEVILLE: In three rulings of the Court. All
21 they're doing in the omnibus objection is filing an
22 administrative order that goes through each of the three
23 rulings. That's all there is.

24 THE COURT: Let me ask you a different question.
25 Could I condition -- you're not asking me to condition

Page 21

1 anything? You're saying that your claim was disallowed but
2 yet there's a pending -- there's a pending claim, right? I
3 don't know if it's disallowed.

4 MS. NEVILLE: Pardon me?

5 THE COURT: I don't know if it's disallowed.

6 MS. NEVILLE: Well, I would say it's disallowed.
7 But the point of this motion -- and you don't have to decide
8 anything on my claim today -- all you have to decide -- and
9 you don't have to decide whether or not filing a claim in --
10 under the circumstances of this case confirm equitable
11 jurisdiction on this Court. That's not Second Circuit law.
12 But you don't have to decide that today.

13 THE COURT: I thought your main said that the
14 filing of the claim submits the creditor to the equitable
15 jurisdiction of the Court for the purpose of the claims
16 resolution process.

17 MS. NEVILLE: But the claims resolution process
18 has gone on a completely separate track and is only related
19 tangentially to the adversary.

20 THE COURT: So, can I ask you a question? Can I
21 ask you a question? If your claim is resolved, why don't
22 you simply withdraw it?

23 MS. NEVILLE: I could. I could.

24 THE COURT: So, if you withdraw the claim, could I
25 impose conditions on that?

Page 22

1 MS. NEVILLE: Like what?

2 THE COURT: For example, that that is race
3 judicata as to the issues relating to the claim objection?
4 Which would mean to me that all of those withdrawals and
5 deposits listed in the Trustee's determination later are
6 established for the purposes of the litigation -- for the
7 case?

8 MS. NEVILLE: They would be --

9 THE COURT: And the reason I raise that is, you
10 know --

11 MS. NEVILLE: I get it --

12 THE COURT: And let me tell you why. Maybe you
13 didn't raise it, but I know. Ms. Chatman raised it a lot,
14 notwithstanding the resolution of the legal issue, the net
15 investment method, and things like that. There were a
16 series of discovery disputes relating to the inability to
17 stipulate to the actual deposits and withdrawals. So that's
18 a live issue, even though the law has been resolved. I
19 don't know if you had stipulated, you know, to the
20 withdrawals and deposits but that's still a live issue. But
21 let me ask --

22 MS. NEVILLE: I didn't stipulate to withdrawals
23 and deposits in each case --

24 THE COURT: Okay, well, then --

25 MS. NEVILLE: -- because there were documents

Page 23

1 missing and we couldn't --

2 THE COURT: All right. So the Trustee's got --
3 so, suppose at the end of the day, the Trustee cannot prove
4 his case. He cannot prove the actual withdrawals or
5 deposits, which means he can't prove you got fictitious
6 profits presumably, and he can't even justify his net equity
7 determination.

8 If you withdraw the claims with prejudice, does
9 that mean you will give up the rights to SIPC Insurance and
10 to a distribution -- I'm asking you this because I don't
11 know if you've discussed this with your clients. That's
12 where we're going with this.

13 MS. NEVILLE: I did discuss it with my clients.

14 THE COURT: All right, you don't have to --

15 MS. NEVILLE: Because I felt like under any
16 circumstance the claims pool was never going to be increased
17 by the allowance of their claims. So I asked them early on
18 in the case if they were willing --

19 THE COURT: You don't have to tell me what you
20 discussed with them.

21 MS. NEVILLE: Right.

22 THE COURT: I just -- that is something that could
23 occur under, you know, based upon what you're -- the relief
24 you're seeking? Is that --

25 MS. NEVILLE: Yes, that's true. That's a

Page 24

1 consequence.

2 THE COURT: Okay.

3 MS. NEVILLE: But I really do believe that they --
4 they are using this motion to establish a link between the
5 adversary proceeding and the claims process, which has been
6 so separated. You know, we have gone up, honestly, three
7 times to the Second Circuit --

8 THE COURT: But how can they be separated if the
9 claim is the basis for exercising equitable jurisdiction?

10 MS. NEVILLE: Only if it involves the claims
11 process. And if the claims process is in Alaska, it doesn't
12 affect Hawaii, you know? That's what's going on here.

13 THE COURT: I'm not sure I follow that one but --

14 MS. NEVILLE: Well, I was geographically
15 challenged there.

16 THE COURT: Well --

17 MS. NEVILLE: But I think that -- I think that
18 there is --

19 THE COURT: I'm not sure I understand the
20 geographic metaphor but go on.

21 MS. NEVILLE: Right. It wasn't a great one. I
22 withdraw it. With prejudice. I do think that -- the first
23 point is that there is a real separation. And they missed
24 an opportunity in the adversary proceeding to make that
25 link.

Page 25

1 If you look at every one of the withdrawal cases
2 on the claims it's because the case was filed, or the claim
3 was filed, and then the counterclaim or an adversary was
4 attached to it. That isn't what happened here. It's going
5 off on this direction; the adversary is going on another.
6 Just because there's an overlap of one fact.

7 THE COURT: You and I are reading different cases.

8 MS. NEVILLE: What?

9 THE COURT: You and I are reading different cases.

10 MS. NEVILLE: Okay. Well, I doubt it because I've
11 got a whole slew of them back here about disallowance of
12 claims under 3006. And I'm not even sure that rule applies
13 in the SIPC.

14 THE COURT: Well, Judge Daniels has said it does
15 and I think it --

16 MS. NEVILLE: Well, but Judge Daniels doesn't have
17 any of my cases. So, you know --

18 THE COURT: Well, it's per choice of ability.

19 MS. NEVILLE: Well -- it really is undisputed that
20 they do say in the complaint "We are not resolving your
21 claims here. We're resolving them over there."

22 And the second thing is that I do believe that the
23 Second Circuit law is pretty clear that you don't
24 irrevocably confer equitable jurisdiction by filing a claim
25 if it doesn't involve the claims process, which this does

Page 26

1 not. It may involve how you calculate some aspect -- how
2 they calculate an aspect of fictitious process but it
3 doesn't affect the claims process.

4 So I think that this motion just avoids the
5 history of the case. For them to complain that we have
6 participated actively in the case and therefore we shouldn't
7 be allowed to withdraw anything is ridiculous.

8 THE COURT: Well, that was partially in response,
9 I think, to someone and it may have been the Chapman
10 clients, who made the argument that our claims were
11 essentially disallowed in --

12 MS. NEVILLE: I said that.

13 THE COURT: Let me finish. In 2012 with the
14 issuance of the net -- the net investment decision, net
15 equity decision. And yet thereafter there was litigation
16 related to the claims like the time-based damages issue and
17 things like that. So, you know, the question is, well, if
18 the claim was resolved in 2012, why are you litigating all
19 these things -- or the interaccount transfer issue -- why
20 are you litigating those if your claim is resolved?

21 MS. NEVILLE: Well, I think those three rulings
22 for the Second Circuit cover basically all the objections in
23 the various --

24 THE COURT: They cover the legal issues. I agree
25 with you. Probably.

Page 27

1 MS. NEVILLE: -- holdings that we have. So,
2 really all that was left is for them to do something to
3 remove the -- to finally determine the claim. I -- they did
4 not -- I didn't withdraw the claims. And their motion has
5 nothing to do -- doesn't -- it barely even mentions the
6 withdrawal of the objections.

7 THE COURT: So, okay, so, if I forget about their
8 motion, I have filed claims and then I have equitable
9 jurisdiction, don't I?

10 MS. NEVILLE: I don't think you do because --

11 THE COURT: Why not? If there's an ending claim -
12 -

13 MS. NEVILLE: For the reason I just said. Because
14 you only had equitable jurisdiction to the extent that it
15 involved a claims resolution.

16 THE COURT: But you're not withdrawing your
17 claims.

18 MS. NEVILLE: The claim is finally determined.

19 THE COURT: I disagree. I disagree.

20 MS. NEVILLE: What's left to do?

21 THE COURT: To determine whether the Trustee has
22 correctly calculated the withdrawals and deposits, which you
23 don't seem to agree. And you want to put him to his proof.
24 Right? Are you willing to concede --

25 MS. NEVILLE: That he has correctly --

Page 28

1 THE COURT: -- that as part -- that you are bound
2 by the Trustee's determination letter, and specifically his
3 analysis of the withdrawals and the deposits, which are the
4 same things in the complaint, by the way, which he always
5 attaches to those dispositions?

6 MS. NEVILLE: Not always the same thing but close.

7 THE COURT: Yeah. Well, I haven't noticed a
8 difference. I've looked at a lot of them but okay.

9 MS. NEVILLE: I haven't -- I'd have to go back and
10 look because in some of the cases there are no proofs of
11 payments made, there are no checks that --

12 THE COURT: I understand that! All I'm saying is
13 you are contest -- you're saying you're not withdrawing your
14 proof of claim, then you're saying, "You know what? Maybe
15 he didn't calculate it right. Maybe at the end of the day
16 I'm a net loser." Let me hear from --

17 MS. NEVILLE: Let me just say one thing.

18 THE COURT: Go ahead.

19 MS. NEVILLE: A couple more things because I think
20 it's important. 3006 does not apply to the withdrawal of
21 the objections.

22 THE COURT: Right, okay.

23 MS. NEVILLE: So that's pretty clear. And I'm not
24 even sure they apply in this case at all. 7041 or 41 gives
25 me the right to withdraw when they haven't answered or moved

Page 29

1 for summary judgment.

2 THE COURT: Why would the Federal Rules of Civil
3 Procedure 41 apply?

4 MS. NEVILLE: Well, what they're arguing is if you
5 can't go to 3006, you use Rule 41 --

6 THE COURT: Well, 3006 directs you to Rule 41
7 anyway.

8 MS. NEVILLE: Well, but that would be -- yes, but
9 in a different level because what they're saying is that my
10 filing of the objection --

11 THE COURT: Well, let me ask you a question.

12 You're fighting over this issue. What's the difference if
13 3006 governs the withdrawal of the claim or the objection or
14 Rule 41 governs it?

15 MS. NEVILLE: Because Rule 41 says that if they
16 haven't answered my contested matter or moved for summary
17 judgment, then I get to withdraw as a right. Where have
18 they?

19 THE COURT: The Trustee's determination is the
20 answer to what is effectively a complaint -- filing of a
21 claim.

22 MS. NEVILLE: Oh, please. That's such a far-
23 fetched -- a far-fetched characterization of the complaint
24 because the complaint doesn't deal with the claims.

25 THE COURT: Okay, I got it. Let me hear from Mr.

Page 30

1 Dexter.

2 MR. DEXTER: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MR. DEXTER: Greg Dexter here with the law firm of
5 Chapman, LLP, on behalf of the Defendants represented by
6 Chapman, LLP. Your Honor, it's highly unusual for any
7 litigant to contest another litigant's withdrawal of a
8 claim, a complaint, a lawsuit with prejudice. All of the
9 cases involved without prejudiced dismissals. They
10 contemplate --

11 THE COURT: At least not the cases I've seen.

12 MR. DEXTER: Which cases is Your Honor referring
13 to?

14 THE COURT: Why don't you continue?

15 MR. DEXTER: It's highly unusual for a court to
16 even scrutinize whether a litigant can withdrawal a
17 complaint or a claim with prejudice. We're saying that
18 they've won. They've determined the claim, and that's it.
19 And to resolve any doubts --

20 THE COURT: So, if that's true, why do we have
21 Rule 3006?

22 MR. DEXTER: Because I don't think Rule 3006 was
23 written in contemplation of someone filing a SIPC claim.

24 THE COURT: No, no, no, no. As a general matter,
25 Rule -- in an ordinary bankruptcy, let's put this aside --

Page 31

1 in this situation you couldn't simply withdraw the claim.
2 You would have to get a court order. If you have the --
3 what you're arguing essentially is if you want to withdraw
4 your claim with prejudice, you have an absolute right to do
5 so. But that's not what Rule 3006 says. So, why not?

6 MR. DEXTER: I think Rule 3006 is written with the
7 view that it's a claim you're making in Bankruptcy Court;
8 not for SIPC Insurance, not against --

9 THE COURT: Forget about SIPC. I'm just asking
10 about Rule 3006.

11 MR. DEXTER: Right.

12 THE COURT: If you have an absolute right -- if a
13 creditor has an absolute right to withdraw a claim, why --
14 why does -- why isn't that included in Rule 3006? Why do
15 you need a court order?

16 MR. DEXTER: I don't know. I wasn't there when
17 they drafted it. But if you look at the rule, it
18 contemplates you filing that complaint in another court, in
19 a non-bankruptcy court. It's impossible --

20 THE COURT: That's not what it says.

21 MR. DEXTER: -- for us to file that claim.

22 THE COURT: You can't file that claim in another--

23 MR. DEXTER: But that's the whole point. If you
24 look at the cases that say the prejudice to a litigant of
25 having a case dismissed, the prejudice is that potentially

Page 32

1 they're going to be sued in another forum.

2 THE COURT: Just -- Mr. Dexter. Just explain to
3 me the rationale for why Rule 3006 does not say, in
4 substance, that a creditor can always withdraw his claim
5 with prejudice without Court permission.

6 MR. DEXTER: Because usually it contemplates the
7 fact that the claim might be filed in another Court.

8 THE COURT: No, it doesn't. That's the silliest
9 thing I've ever heard. The only place you can file a claim
10 is in the bankruptcy.

11 MR. DEXTER: Well, you can -- okay, Your Honor
12 might be right about that. Then I don't -- I'm not sure the
13 answer to that offhand.

14 THE COURT: All right, well that suggests that you
15 don't have an absolute right to withdraw a claim with
16 prejudice; doesn't it?

17 MR. DEXTER: And then the question becomes how is
18 the Trustee harmed at all if we withdraw the claim, and he's
19 not.

20 THE COURT: You think that's the only question?

21 MR. DEXTER: Yeah. So we come to Your Honor and
22 Your Honor has the authority to determine whether we're
23 going to be permitted to withdraw the claims and objections
24 and you look at the Zagano factors and there's not a single
25 case that's even close to the circumstances here that would

Page 33

1 support Your Honor making a ruling saying that we can't --

2 THE COURT: I think you have to do a little more
3 research. Let me stop everybody. There are a couple of
4 issue here. One issue that nobody has addressed is the
5 general proposition that a Court's jurisdiction is
6 determined when the proceeding is filed. And subsequent
7 changes that may affect that jurisdiction don't affect the
8 Court's underlying jurisdiction. So you're going to have to
9 brief that issue.

10 And I think you should start with Judge Walsh's
11 decision which is on all fours with this case, by the way in
12 EXDS, which is 301 Bankruptcy Reporter 436. There are other
13 cases, too. Another point -- I'm not deciding this today,
14 but another point is, this Rule 3006 goes back to the old
15 Bankruptcy Act, Rule 3005. And the reason for the rule was
16 to prevent somebody from doing precisely what you're doing
17 which is withdrawing a claim and stripping the Court of then
18 summary jurisdiction for the purposes of defeating
19 Bankruptcy Court's jurisdiction. So those are issues that
20 are in the case. I know you're talking about the Zagano
21 factors and all that. You know, you have to lay -- it looks
22 to me like the only reason you're withdrawing claim at this
23 point is to defeat jurisdiction and ultimately delay the
24 resolution of the case. But I think you have to discuss
25 that threshold issue of whether the withdrawal of the claim

1 or the attempted withdrawal of the claim affects the
2 Bankruptcy Court's equitable jurisdiction if the claim
3 itself provided the basis for the equitable jurisdiction. I
4 mentioned Judge Walsh's decision. There are others that
5 I've seen that deal with this issue. And you have to deal
6 with this issue. It may have nothing to do with Rule 41 or
7 anything else, but...

8 MS. NEVILLE: Your Honor, I think you began to
9 address that in two decisions in this case and there's one
10 in the Lehman case.

11 THE COURT: In Applebaum and in Lehman, the claims
12 resolution process came to an end because there was an
13 actual disallowance or in Applebaum a deemed disallowance.
14 That hasn't occurred here.

15 MS. NEVILLE: Well, there's pretty close to it.

16 THE COURT: Well, but it's different. It's still
17 a live claim. You're still disputing from what I hear of
18 the Trustee's computation of the net equity --

19 MS. NEVILLE: Not in every case, but in some
20 cases.

21 THE COURT: Well, that's another problem with the
22 procedure.

23 MS. NEVILLE: Yes.

24 THE COURT: And the Trustee's right. You really
25 have to make a motion in each case to withdraw the claim and

Page 35

1 establish the factors and they may differ in different
2 cases. But in any event --

3 MS. NEVILLE: I'd like to point out that in the
4 Mann case it was disallowed because it was prior to Judge
5 Lippman's initial order on the --

6 THE COURT: So why didn't you withdraw the claim
7 for 10 years or whatever?

8 MS. NEVILLE: So we disallowed that claim in the
9 Mann case.

10 THE COURT: All right. I don't have that.

11 MR. CREMONA: Your Honor --

12 MS. NEVILLE: Yes, you do. It was part -- it was
13 --

14 MR. CREMONA: Your Honor, if I may rebut that. I
15 mean, now we're getting -- we responded to that very issue.
16 Ms. Neville is referring to --

17 THE COURT: Which issue?

18 MR. CREMONA: I believe you're referring to the
19 net equity order that dismissed 78 actions. Or excuse me.
20 Let me back up.

21 MS. NEVILLE: Claims.

22 MR. CREMONA: Let me be clear.

23 MS. NEVILLE: Disallowed claims.

24 MR. CREMONA: Disallowed the portions of 78 claims
25 and specifically, Judge Lippman order retained jurisdiction

Page 36

1 for all issue outside of the pure net equity calculation.

2 The Mann objection raises issue beyond that and I'd like to
3 tie that into something I wanted to rebut that they said,
4 which is something Your Honor pointed out.

5 They're saying they're going to withdraw the claim
6 and they're going to withdraw the objection or they're not
7 withdrawing the claim but the point is, even if they
8 stipulated to the ins and outs and the amounts, that only
9 gets us half the way there, Your Honor. Unless they were
10 going to withdraw with prejudice as to all the legal issues
11 raised in that objection, such that they couldn't raise them
12 in the adversary proceeding, then that would get us there.

13 THE COURT: Well --

14 MR. CREMONA: But that's the point, though.

15 THE COURT: What issues?

16 MR. CREMONA: Your Honor, in the objection they
17 raised the statute of limitations, the netting over the life
18 of the account, prejudgment interest, profit withdrawal.
19 All of those issues --

20 THE COURT: That might be a reasonable condition
21 to allow them to withdraw their claim, but they're not
22 moving to withdraw their claim and --

23 MR. CREMONA: But, Your Honor --

24 THE COURT: You know, we can do one of two things.
25 I can deny your motion only because it's academic. They're

Page 37

1 telling me they're not seeking to withdraw their claims.
2 They say they've withdrawn their objections and I can just
3 schedule a trial and, you know, then they can make that
4 argument.

5 MR. CREMONA: Schedule a trial as to --

6 THE COURT: Well, I -- then I guess --

7 MR. CREMONA: That's fine, Your Honor. I think we
8 can resolve the issue in the Mann trial and I think that's
9 the most efficient way to do it. They are inextricably
10 intertwined as we start -- that's where we started.

11 And I think, Your Honor, we -- I'm sorry, if we're
12 not going to -- we did confer with our experts. We're
13 prepared to move forward pursuant to the directive of Your
14 Honor with that case. We have trial dates. We're not going
15 to resolve it through stipulation. To allow it to continue
16 in the absence of any motions contravenes the procedure of
17 the case. Mediation in this case --

18 THE COURT: You never moved to withdraw a
19 reference of that case, did you?

20 MS. NEVILLE: I may have (indiscernible).

21 THE COURT: Pardon?

22 MS. NEVILLE: I may have (indiscernible).

23 MR. CREMONA: But, Your Honor --

24 THE COURT: But you haven't done it yet. That's -

25 -

Page 38

1 MR. CREMONA: Your Honor --

2 MS. NEVILLE: This hearing -- I saw that this
3 hearing was -- currently raised some issues on the withdraw
4 and I was waiting to see how it turned out. But they can't
5 keep saying --

6 MR. CREMONA: Your Honor --

7 MS. NEVILLE: -- that there are all these
8 peripheral issues that are raised once the plan was
9 disallowed by Judge Lippman --

10 THE COURT: Right.

11 MS. NEVILLE: -- without telling you what they
12 are.

13 THE COURT: But I thought Mr. Cremona was saying
14 it was disallowed only to the extent of this net investment
15 versus last statement --

16 MR. CREMONA: That's precisely correct.

17 THE COURT: -- issue and then if it was disallowed
18 -- well, if it's not -- you're saying it was completely
19 disallowed by Judge Lippman's order?

20 MS. NEVILLE: It was disallowed exactly the way --

21 MR. CREMONA: Your Honor, I have the order.

22 THE COURT: It had other issues and I assume you
23 participated in subsequent litigation solely related to the
24 claims, like the inter-account transfer issue.

25 MS. NEVILLE: There's no inter-account transfers.

Page 39

1 THE COURT: All right, and the time based damages
2 issue which would -- you know, if your claim is disallowed
3 there's no reason for that participation so obviously you
4 didn't think your claim was disallowed in total.

5 MS. NEVILLE: So it's disallowed by an order of
6 Judge Lippman, but not disallowed because there's one other
7 issue.

8 MR. CREMONA: Your Honor, the order is clear. I'm
9 happy to hand up a copy.

10 THE COURT: I think I have a copy.

11 MR. CREMONA: It makes clear that it resolves only
12 the issue as you pointed out, last statement versus net
13 investment. All other issues were retained -- the
14 Bankruptcy Court retained jurisdiction as to all other
15 issues and those include all the other issues raised in the
16 objection, particularly with Mann.

17 THE COURT: So I'm clear, nobody's trying to
18 withdraw their claims?

19 MR. DEXTER: No, we are.

20 THE COURT: Okay, so --

21 MR. DEXTER: Yeah, we are.

22 THE COURT: The Chaitman clients are seeking to
23 withdraw. Then I need briefing on that jurisdictional issue
24 I mentioned specifically, whether -- if the claim provides
25 the basis for the Court's equitable jurisdiction at the time

Page 40

1 the action is commenced, does the withdrawal of that claim
2 affect the Court's equitable jurisdiction under that line of
3 cases which say you determine jurisdiction.

4 They deal with subject matter jurisdiction,
5 admittedly. But under that line of cases that say that the
6 Court's jurisdiction is determined when the action is filed
7 and the -- I know I've had cases where the bankruptcy is
8 dismissed but jurisdiction still exists and we have this
9 situation. You'll find cases which say that you can't
10 withdraw the claim to defeat the equitable jurisdiction
11 Bankruptcy Court. As a matter of fact for the first time in
12 40 years I looked at Collier's 14 and it deals with this.
13 So you can supply briefs not exceeding 10 pages in two weeks
14 of today?

15 MS. NEVILLE: I'd like to --

16 MR. DEXTER: That's fine, Your Honor.

17 MS. NEVILLE: -- participate in that.

18 THE COURT: But you said you're not withdrawing
19 your claim.

20 MS. NEVILLE: So what are you doing with their
21 motion to strike my withdrawal of the objection?

22 THE COURT: What's the basis for striking the
23 withdrawal of the objections?

24 MR. CREMONA: Your Honor, I think the bases are
25 similar to what I articulated earlier. What I was going to

Page 41

1 ask Your Honor was a question as to this additional
2 briefing. I mean, it seems to me -- again, Rule 41 is a
3 gating issue. If they cannot meet the standard as to that
4 withdrawal based -- even if you treated this as a motion to
5 withdraw. So I think we have to back up. We never really
6 got into -- 3006 precludes the withdrawal here. I think
7 it's a semantical distinction to make claim versus
8 objection.

9 THE COURT: Ms. Neville is saying whatever Rule
10 3006 says -- and maybe I can't withdraw my claim without
11 Court order -- Rule 3006 doesn't deal with the withdrawal of
12 objections because this is an unusual claims process.

13 MR. CREMONA: Understood, Your Honor, but Rule 41
14 clearly applies to a contested matter which --

15 THE COURT: Okay.

16 MR. CREMONA: -- Ms. Neville's objection clearly
17 implicated and invoked Rule 9014.

18 THE COURT: That's true.

19 MR. CREMONA: Your Honor, we also have in their
20 papers the In RE: 20/20 case which specifically said that
21 the matter is joined. The claim is filed and it's met with
22 an adversary complaint. It is joined. And that's precisely
23 what we have here, Your Honor.

24 THE COURT: Yeah, I think he's right. In essence,
25 your objection is analogous to a reply. Your claim being

Page 42

1 the complaint and there are many cases that say the
2 complaint -- the claim is the functional equivalent of a
3 complaint. An issue is joined when an objection is made and
4 that initiates a contested matter.

5 MS. NEVILLE: But, Your Honor, it was joined for
6 the claims allowance process and not the adversary --

7 THE COURT: Why don't we deal with this threshold
8 issue? I'd rather -- let's assume that what you're really
9 doing is withdrawing your claim. Let's deal with the
10 threshold issue of whether it makes any difference to the
11 jurisdiction of the Court, because if it doesn't they can
12 withdraw whatever they want; right? Two weeks.

13 MS. NEVILLE: Two weeks.

14 THE COURT: Ten pages each; okay?

15 MR. CREMONA: Your Honor, I still think -- we were
16 happy to do that and we certainly will get that done. I
17 still do think that it is appropriate to move forward on the
18 Mann pretrial conference because although Ms. Neville says
19 she wants to move to withdraw the reference, we have seen
20 what happened last time we were in this situation --

21 THE COURT: Well, I could do that also, but --

22 MR. CREMONA: In order for Your Honor to control
23 your docket as you did in the Lawrence and Nelsons cases,
24 you scheduled trial and afforded the opportunity --

25 THE COURT: In those cases it was -- first of all,

Page 43

1 I have to tell you had it been brought to my attention that
2 there were pending claims, I never even would have stayed
3 the trial. I would have gone forward with it. I didn't
4 realize it at the time.

5 But now it's brought to my attention that there is
6 a suggestion that either by withdrawing the objection or the
7 functional equivalent, withdrawing the claim, I no longer
8 have that good of a jurisdiction. If I conclude that I do
9 and it doesn't matter whether they withdraw the claim, then
10 I can go forward with all the cases and I don't have to go
11 through a Zagano analysis or anything like that.

12 MR. CREMONA: Understood, Your Honor.

13 THE COURT: I mean jurisdiction is a threshold
14 issue, not Zagano; right? Okay.

15 MR. CREMONA: So would you propose then, Your
16 Honor, to defer the --

17 THE COURT: I'll hold -- yeah, I want to see the
18 briefing on this issue and as I said, there are a couple of
19 cases --

20 MS. NEVILLE: There are some other Delaware cases
21 that deal with this --

22 THE COURT: I don't know. I just -- you know,
23 there's another one by a magistrate judge which was raised
24 in the context of, I think, civil litigation or something
25 like that, but --

Page 44

1 MS. NEVILLE: I don't believe that the context of
2 the cases is important because this is a unique --

3 THE COURT: Ms. Neville, you've been practicing
4 probably as long as I have. This issue has been around
5 since the Act, whether you can withdraw your claim to escape
6 the equitable jurisdiction of the bankruptcy. It's been
7 around --

8 MS. NEVILLE: Yeah. Okay.

9 THE COURT: -- for years and years and years.
10 There is case law on this. As I said, Collier's 14 talks
11 about this in terms of Rule 305. There are various theories
12 about the right to withdraw your claim and because of my
13 colloquy with Mr. Dexter, it's clear to me that you don't
14 have the absolute right to withdraw your claim because if
15 you did, Rule 3006 would say that.

16 MS. NEVILLE: Rule says -- 3006 also talks about
17 acceptance or rejection of a plan and I think that to some
18 extent the reason that the rule was constructed so that you
19 didn't have the absolute right was related to that --

20 THE COURT: The participation in the case and
21 getting the benefit of the case. I understand that. But
22 that's not the only thing that rule has been interpreted to
23 mean. So what I will do is I'll adjourn the Bam pretrial
24 conference. What couldn't you agree on? What was the issue
25 of fact that you couldn't agree on?

1 MR. CREMONA: Your Honor, Ms. Neville has taken a
2 position that it's not a Ponzi scheme.

3 MS. NEVILLE: Whether or not it was a Ponzi scheme
4 and whether it was trading.

5 THE COURT: Okay, but that is implicated in your
6 claim also because if it wasn't a Ponzi scheme, then all of
7 your transactions would be legitimate distributions; right?
8 Because it's only because it was a transfer in connection
9 with --

10 MS. NEVILLE: Not necessarily because it also
11 could have been just ordinary fraud and not a Ponzi scheme.

12 THE COURT: But if Madoff --

13 MS. NEVILLE: Yeah, I think you're right that he
14 would have had a right to a claim.

15 THE COURT: Yeah. Okay. So the -- sounds to me
16 like the adversary proceedings do implicate the claims. I
17 mean, I guess you could withdraw with prejudice, but you're
18 not doing that so --

19 MS. NEVILLE: Well, I might. We'll have to see on
20 that one.

21 THE COURT: Well, you have to make --

22 MS. NEVILLE: This is not a dispute about the ins
23 and the outs on that one.

24 THE COURT: Okay. All right, but if there's not a
25 dispute then they can make a motion for summary judgment in

1 here or --

2 MS. NEVILLE: But they're saying --

3 THE COURT: Let me just finish.

4 MS. NEVILLE: Sorry.

5 THE COURT: In here or District Court, say they
6 don't dispute. First of all, he allocated to a Ponzi scheme
7 so they've established that because that's evidence. You
8 would have to come forward with other evidence which is what
9 you would have to do here anyway, but -- and which you would
10 have to do in the claims allowance process, I guess. So
11 they are intertwined. They're very similar issues in
12 computing the net equity and the fictitious property.

13 MS. NEVILLE: But, you know, similarly --

14 MR. CREMONA: Absolutely, Your Honor. That's --

15 MS. NEVILLE: -- same, Your Honor.

16 THE COURT: Well --

17 MS. NEVILLE: That's the whole point.

18 THE COURT: Let me rephrase that. They are
19 exactly the same.

20 MR. CREMONA: Precisely, Your Honor, which is why
21 if they're going to withdraw the claim with prejudice, then
22 they have to also acknowledge that they foreclosed those
23 same legal arguments that are the same --

24 THE COURT: Would that be an unfair result?

25 MR. CREMONA: -- on both sides.

Page 47

1 MS. NEVILLE: You know, I have to say --

2 MR. CREMONA: And then there are no issues
3 remaining to be adjudicated.

4 THE COURT: What conditions could I impose on you
5 for withdrawal of --

6 MS. NEVILLE: I have to look at the --

7 THE COURT: You can brief that also, what the
8 appropriate conditions are.

9 MR. DEXTER: I think Judge Rakoff in the
10 Consolidated Stern decision held that the issues in the
11 claims allowance process are not and could not be res
12 judicata in the avoidance actions. So --

13 THE COURT: As to all -- as to any issue? So if I
14 had a trial on a claims process which I made a determination
15 as to what the net deposits and net withdrawals -- or what
16 the deposits and withdrawals were, you're saying that
17 wouldn't be preclusive and on the same issue between the
18 same parties in an adversary proceeding?

19 MR. DEXTER: I don't know if --

20 THE COURT: I can't believe you said that.

21 MR. DEXTER: I don't know if the opinion goes so
22 far as to say what would happen if Your Honor adjudicated
23 it, but he quite clearly --

24 MR. CREMONA: Your Honor, I'm happy --

25 MR. DEXTER: He quite clearly says that the claims

Page 48

1 allowance process resolves nothing more than the Trustee's
2 determination of net equity, and that's it.

3 THE COURT: But when you withdraw something -- you
4 know this. When you withdraw something with prejudice, that
5 can also be an adjudication on the merits which does have
6 res judicata and collateral estoppel effect.

7 MR. CREMONA: And we cited cases to that effect in
8 our papers, Your Honor.

9 THE COURT: And maybe if you want to withdraw it,
10 that's the appropriate disposition. Then you're basically
11 giving up those defenses and you can go and try your case
12 wherever you want to try it.

13 MS. NEVILLE: It's not the only defense, Your
14 Honor. The ins and outs are not the defense. Okay.

15 THE COURT: Okay. All right. I look forward to
16 your briefings.

17 MR. CREMONA: Thank you, Your Honor.

18 MR. DEXTER: Thank you, Your Honor.

19 MS. NEVILLE: Your Honor is that -- are you saying
20 a letter brief or a real brief? What is it you --

21 THE COURT: Well, 10 pages single spaced is just
22 too much on this issue. I would like to see -- is 10 pages
23 enough? It sounds like it should be enough.

24 MS. NEVILLE: I understand there's a new font for
25 --

Page 49

1 THE COURT: Twelve point type.

2 MS. NEVILLE: -- whatever this generation is
3 called. It's called Times New Roman.

4 THE COURT: I like Georgia. Georgia font in 12
5 point --

6 MS. NEVILLE: And it's bigger than Times Roman so
7 that they don't have to write as much.

8 THE COURT: You know, I will tell you that, as you
9 probably know, the new appellate rules no longer have page
10 counts; they have word counts.

11 MS. NEVILLE: Oh, God.

12 THE COURT: And most of the comments that were
13 received to the proposed rule had to do with the word
14 counts.

15 MR. DEXTER: Your Honor, might it make sense to
16 extend the briefing to 15 pages?

17 THE COURT: Okay.

18 MR. DEXTER: It seems like there -- the more we
19 talk about this, the more issues --

20 THE COURT: There are a lot of issues. It's not
21 an easy issue and I don't think it's just a Rule 41 issue.

22 MS. NEVILLE: But, Your Honor --

23 MR. CREMONA: Your Honor, I would submit that then
24 we should probably --

25 MS. NEVILLE: The other thing is --

Page 50

1 MR. CREMONA: -- clarify precisely what the issues
2 are so as to avoid --

3 THE COURT: Well, the principal issue is whether
4 the withdrawal of the claim or the functional equivalent of
5 the withdrawal of the claim affects the Court's jurisdiction
6 and equitable jurisdiction.

7 MS. NEVILLE: I have another little rug to throw
8 on this.

9 THE COURT: Go ahead.

10 MS. NEVILLE: I have 15 clients. I don't know how
11 many Chaitman has, but there are a whole slew of other
12 people out there and claimants out there. We're going to be
13 going off on a tangent that's important to however --

14 THE COURT: I don't think I need -- I have a
15 motion before me.

16 MS. NEVILLE: Right. I was totally going to
17 resolve this.

18 THE COURT: Ms. Neville, if I conclude as a matter
19 of law -- and I'm not saying I will -- but if I conclude as
20 a matter of law that the withdrawal of a claim doesn't
21 affect the Court's equitable jurisdiction, where the claim
22 is filed before the adversary proceeding and the equitable
23 jurisdiction to entertain the adversary proceeding is
24 dependent on the filing of the claim, and I conclude that
25 that doesn't defeat the jurisdiction, do you think I'm going

Page 51

1 to reach a different result in another case?

2 MS. NEVILLE: Did you say would you reach a
3 different decision in case?

4 THE COURT: Yes. I don't think I need another
5 omnibus proceeding. Nobody else is seeking to withdraw
6 their claims.

7 MS. NEVILLE: Well you may be getting one anyway.

8 THE COURT: I don't know if there are any other
9 defendants out there other than the ones represented by
10 these two firms.

11 MS. NEVILLE: Oh, yes.

12 THE COURT: Well, they apparently -- maybe they
13 want to continue to participate on the off chance --

14 MS. NEVILLE: They wanted to see what was going to
15 happen to me.

16 THE COURT: Or maybe they're saying hey, you know
17 what? If these theories that Madoff was actually trading
18 treasury securities or there wasn't a Ponzi scheme prevail,
19 we'll wind up being net losers and we'll have a big claim in
20 the case. Maybe that's why they're not participating.
21 Sounds to me like you don't think much of that theory.

22 Okay. Two weeks, 15 pages, Mr. Dexter.

23 MR. DEXTER: Thank you, Your Honor.

24 THE COURT: Because you asked for it. The
25 principal issue is jurisdiction and the second issue, I mean

Page 52

1 I guess it's kind of -- well --

2 MS. NEVILLE: Conditions.

3 THE COURT: Should I -- does anybody object --
4 well you may object, but do you object, Mr. Dexter, to my
5 treating your opposition as a motion to withdraw the claims
6 -- your claims?

7 MR. DEXTER: Well, not if Your Honor is going to--
8 I guess I do if Your Honor's going to deny it.

9 THE COURT: Well, because I -- no, no, no. No,
10 no, no.

11 MR. DEXTER: By the way --

12 THE COURT: I come back to the issue of if
13 nobody's withdrawing their claims, I don't have to decide
14 anything.

15 MR. DEXTER: Yeah --

16 THE COURT: There's a pending claim and then I'll
17 just schedule a trial.

18 MR. CREMONA: Your Honor, I just want to be clear
19 and Mr. Dexter, I'm sure, will correct me if I'm wrong. I
20 believe the only three claims that were actually withdrawn
21 were with respect to the defendants Sarah and Lawrence and
22 the Nelsons. I don't believe --

23 THE COURT: there's always that supplemental list
24 that --

25 MR. CREMONA: That was, I believe, only claim

Page 53

1 objection withdrawals. So we're only dealing with three. I
2 believe we need to be clear here and I don't think Mr.
3 Dexter has been clear about that.

4 MR. DEXTER: No, that's correct.

5 MS. NEVILLE: Does that change your view of what
6 we should be briefing? Because it seems premature to do it

7 --

8 THE COURT: Well, I have three -- I have those
9 three requests for withdrawals of claims and I can deal with
10 the issue as to the other three and just say the rest of the
11 motion is academic because nobody's withdrawing their claims
12 and then I can schedule a trial in Bam.

13 MS. NEVILLE: Well, we still have to deal with
14 what that disallowance meant and --

15 THE COURT: There's no disallowance, though, under
16 the order. Oh, the disallowance in Bam?

17 MS. NEVILLE: Yeah.

18 THE COURT: And how to you propose to deal with
19 that?

20 MS. NEVILLE: I hadn't actually thought it
21 through. I am going to -- motion to withdraw the records
22 which is going to raise the same issues as you're asking us
23 --

24 MR. CREMONA: Your Honor, for clarity of the
25 record, I'd just like to say that we made clear that the

Page 54

1 Trustee is seeking prejudgment interest in these cases and
2 if in the motion to withdraw the references made in the Bam
3 case, which is on all four with the Carol Nelson and Sarah
4 Lawrence decisions from Judge Daniels which were just
5 issued, I do think that needs to be considered as a factor
6 that militates in favor of avoiding prejudgment interest.

7 THE COURT: When the cases first went to Judge
8 Daniels, there were pending -- there's no question there
9 were pending live disputes relating to their claims. This
10 is a little different. Maybe it's a little different.

11 MR. CREMONA: He clarified in his denial of the
12 motion for reconsideration on the very issues Your Honor
13 talked about, that Rule 3006 precluded it so it was moot.
14 So I mean, we'll --

15 THE COURT: He was ruling on the withdrawal of the
16 claims; right?

17 MR. CREMONA: Correct. He found that that was not
18 proper and he conferred Your Honor with final adjudicative
19 authority as a result.

20 MS. NEVILLE: It's only because the Trustee made
21 an argument that there was a 502(d) claim.

22 MR. CREMONA: No, that's not --

23 THE COURT: I know what I'm going to do.

24 MR. CREMONA: That's not accurate, Your Honor.
25 I'm happy to get into that argument as well.

1 THE COURT: But I am going to -- I have a better
2 way to tee this up because we're talking about -- I'm going
3 to schedule a trial in Bam. You can make a motion to
4 withdraw the reference and if the District Court withdraws
5 the reference I won't conduct a trial. But right now, it
6 appears to me from everything I've seen that I still have a
7 live claim.

8 MS. NEVILLE: Okay. Let me just add one other
9 thing about Bam and Mann. First of all, Your Honor may not
10 be aware because this is coming down the pike, but the
11 Trustee just filed a motion to have a lot of other discovery
12 and we have --

13 THE COURT: In Bam?

14 MS. NEVILLE: In all of the cases.

15 MR. CREMONA: No, that's not correct, Your Honor,
16 and I'm happy to go through --

17 THE COURT: Let her speak and then I'll...

18 MS. NEVILLE: But I do have a request in front of
19 Judge Moss and to Mr. Pomona about the documents that were
20 missing from the production for Mann with respect to trading
21 and trade confirmations. So there is still an issue. We
22 did not know that the confirmations existed until we had a
23 meeting on that last Ponzi scheme thing --

24 THE COURT: I'm sorry, what confirmation?

25 MS. NEVILLE: -- last month. The trade

1 confirmations.

2 THE COURT: Right.

3 MS. NEVILLE: We did not know that the Trustee had
4 and not produced as part of the customer file the trade
5 confirmations. So I've asked for the trade confirmations.

6 THE COURT: For the in-house -- their own
7 proprietary trading?

8 MS. NEVILLE: Right.

9 THE COURT: Okay.

10 MR. CREMONA: Your Honor, can --

11 MS. NEVILLE: So I've asked for those and Mr.
12 Cremona and I were exchanging letter arguments about that
13 and there are, apparently, foxes of trade confirmation which
14 I'm willing to go and look at because that's something that
15 I need for part of this -- for everyone in the trials.

16 MR. CREMONA: Your Honor, I would just address
17 that briefly. We receive a letter from Ms. Neville
18 yesterday on the eve of this pretrial conference seeking to
19 join the Judge Moss trading records to see if Your Honor --

20 THE COURT: She hasn't been part of this?

21 MR. CREMONA: No.

22 THE COURT: Okay.

23 MR. CREMONA: And that was pending since 2016 --

24 MS. NEVILLE: Yes, I have.

25 MR. CREMONA: That is not accurate, Your Honor.

Page 57

1 Also if I may just complete the facts here. There is an
2 order that Your Honor is aware of that requires a
3 stipulation to be signed by Your Honor for a matter to be
4 referred to Judge Moss that wasn't adhered to. This is
5 belated attempt to join in a proceeding that's been going on
6 for two years.

7 It is procedurally improper and let me just
8 clarify, Your Honor, what Ms. Neville is asking for are
9 supplemental Rule 26 disclosures which we made in 2014, to
10 be clear, and Your Honor is aware of all of the disclosures
11 that we've made have been clear that we have not disclosed
12 all of our documents. We have made it abundantly clear what
13 is scanned and not scanned; what's in the data room, what's
14 not. It is disingenuous to say that she is not aware that
15 trade confirmation existed. But putting all that aside --

16 THE COURT: You haven't stipulated to go before
17 Judge Moss?

18 MS. NEVILLE: No, Your Honor, but -- just one
19 second, Your Honor.

20 MR. CREMONA: So that shouldn't hold up the
21 matter, Your Honor. And, but putting all that aside, the
22 Trustee has said fine. If you would like to go look at
23 those documents, go ahead. That should not delay this trial
24 and by the way, Ms. Neville has already indicated she's
25 going to move to withdraw the reference and by the way

1 there's no live discovery dispute that could even be
2 referred to Judge Moss.

3 Discovery closed in 2015. She's asking for -- Ms.
4 Neville didn't say I comply with open and existing
5 discovery. She never did request the trade confirmations.
6 She didn't serve discovery in seven of the 15 cases that she
7 is trying to submit to Judge Moss. It's important for Your
8 Honor to know the facts. I apologize for belaboring them,
9 but we can't just -- I think it's important to know exactly
10 what the facts are.

11 THE COURT: It sounds to me that it's a threshold
12 matter. You're not part of the Judge Moss proceeding.

13 MS. NEVILLE: Your Honor, I'd like to dispute that
14 because one of the things that is include in that is all of
15 the document requests that Ms. Chaitman made in connection
16 with the Madoff deposition, that is what she is focusing on
17 and I was specifically a participant in that.

18 THE COURT: When did you make document requests,
19 though? She was making them on behalf of her own clients;
20 wasn't she?

21 MS. NEVILLE: Well, we made them jointly.

22 THE COURT: And she stipulated to go before Judge
23 Moss which you haven't done. Here's what I'm going to do.
24 I'm going to schedule a trial. Discovery closed years and
25 years ago. You're not a participant in any of these

Page 59

1 disputes before Judge Moss. You didn't stipulate to submit
2 any disputes to Judge Moss. I'm not aware of any disputes
3 before me that should hold up this trial.

4 I'm going to schedule the trial, give you a chance
5 to go and make a motion to withdraw the reference and deal
6 with that. With respect to this issue of deeming a motion
7 to be made, make your motion to withdraw your claim if
8 that's what you want to do. As far as I'm concerned in the
9 absence of withdrawal, there's a live claim. And the issues
10 that are -- and maybe you don't want to withdraw your claim
11 because you think you'll hit a home run at the trial and
12 it'll turn out you'll be a net loser and be able to
13 participate in the estate. I don't know why you're not
14 doing it, but if you haven't withdrawn your claim there's no
15 issue.

16 So I'll schedule the trial in Bam.

17 MR. CREMONA: Your Honor, we've conferred with our
18 testifying expert and can propose certain dates if that
19 convenient for the Court.

20 THE COURT: What dates?

21 MR. CREMONA: The testifying experts and the trial
22 team are available during the first week of December.

23 THE COURT: How long do you think this trial is
24 going to take?

25 MR. CREMONA: Two to three days, I would say, Your

Page 60

1 Honor.

2 THE COURT: How long you think the defense will
3 take?

4 MS. NEVILLE: I have no idea, Your Honor. I am
5 going to move to withdraw the reference --

6 THE COURT: Okay.

7 MS. NEVILLE: -- and I do think that that is too
8 soon for --

9 THE COURT: Why? The case has been -- discovery's
10 been closed for three years, four years.

11 MS. NEVILLE: Discovery's been closed and now
12 we're learning all these things that have not been ever told
13 to us in 10 years. You know, I'm tired of them telling us
14 that we've been in this case for 10 years when we suddenly
15 learn that there are all these documents that we haven't
16 been given access to.

17 THE COURT: Look. There have been live discovery
18 disputes before Judge Moss regarding this very issue.
19 You're not part of that and now you're suddenly saying hey,
20 wait a minute, there's all this other information --

21 MS. NEVILLE: I --

22 THE COURT: Let me finish. That I may or may not
23 have asked for. It goes back years and years and years.
24 I'm going to schedule the trial and you can make a motion to
25 withdraw the reference. But this case is trial ready. The

Page 61

1 mediation was concluded almost two years ago. What are
2 those dates?

3 MR. CREMONA: The first week, we're fully
4 available.

5 THE COURT: All right. I'll schedule it for
6 Monday, December 3rd. That gives you plenty of time to move
7 to withdraw the reference.

8 MS. NEVILLE: Fine.

9 MR. CREMONA: Thank you, Your Honor. Would you
10 like us to submit an order that?

11 THE COURT: Yeah. And you can exchange witness
12 lists and documents a week before the trial.

13 MS. NEVILLE: There's not going to be a trial in
14 this (indiscernible).

15 THE COURT: All right. Well, maybe there will but
16 if there is, plaintiffs can use numbers. You know, you can
17 give them to me in a loose leaf separated by exhibits. You
18 can use letters, separated by exhibit tabs.

19 MR. CREMONA: Understood, Your Honor.

20 THE COURT: I guess I don't have any other pending
21 matters before me because they're not seeking to withdraw
22 their claims. If you seek to withdraw your claims, you'll
23 have to make a motion, Mr. Dexter, and then we'll deal with
24 each claim.

25 MR. DEXTER: We'll make the motion.

Page 62

1 THE COURT: All right. Let me just...

2 MR. CREMONA: Just to be clear, Your Honor, so we
3 all have clarity of the calendar, the three cases where the
4 attempted claim withdrawal were made, we have a pretrial
5 conference scheduled on October 10th.

6 THE COURT: Here?

7 MR. CREMONA: Yes.

8 THE COURT: All right, I'll fix trial dates and
9 then unless there's a motion to withdraw and then I'll deal
10 with the issues. I don't really have to deal with these
11 jurisdictional issues yet, but if you make the motion to
12 withdraw the reference -- I'm sorry, if you make the motion
13 to withdraw the claim that underlying issue is there whether
14 it makes a difference and I think in some of these, couple
15 of these cases I mentioned, the motion was denied as moot
16 because it really had no effect on anything. All right?

17 MR. DEXTER: Okay.

18 MR. CREMONA: Thank you, Your Honor.

19 MR. DEXTER: Just so Your Honor is aware, we'll be
20 filing today our petition for mandamus in the Second Circuit
21 on the jury trial issue.

22 THE COURT: A mandamus in the Second Circuit?

23 MR. DEXTER: That's right.

24 THE COURT: On the issue that Judge Daniels
25 decided?

1 MR. DEXTER: That's right.

2 THE COURT: Okay.

3 MR. CREMONA: I don't see that having any
4 procedural effect on the trial, Your Honor.

5 THE COURT: What you be compelling him to do or
6 not do?

7 MR. DEXTER: Give the defendants their Seventh
8 Amendment right to a jury trial.

9 THE COURT: But you don't have a Seventh Amendment
10 right to a jury trial with a pending claim. The Second
11 Circuit and the Supreme Court have ruled that.

12 MR. DEXTER: Well, I mean, are we going to argue
13 that right now again?

14 THE COURT: No, no. You can argue that before the
15 Second Circuit. All right, so I guess I'll deny your motion
16 without prejudice since there really are no withdrawal --
17 motions to withdraw.

18 The notice -- except to the extent that notices of
19 withdrawal in these three cases are a nullity because they
20 didn't follow the appropriate procedure and that's without
21 prejudice, obviously. You've met -- you can make a motion
22 to withdraw your claim.

23 MR. CREMONA: Again, understood Your Honor, but I
24 would say the same logic applies to the remain purported
25 withdrawals of the objections. As Ms. Neville acknowledged,

1 I don't see why the motion should be denied. I think we've
2 reset the matter and now we have additional briefing, but on
3 the papers before you, Your Honor, I think the motion should
4 be granted.

5 THE COURT: I'll grant the motion to the extent
6 it's saying that Rule 3006 applies because Judge Daniels
7 said it applied and also because this proceeding is supposed
8 to be administered or adjudicated to the extent possible in
9 accordance -- as an ordinary bankruptcy.

10 MR. CREMONA: Absolutely.

11 THE COURT: But to tee this up procedurally, I'll
12 conclude that you require a -- I hate to interrupt myself
13 but I'm being told that she's not even trying to withdraw
14 her claims.

15 MR. CREMONA: She's trying to withdraw her
16 objections. Again, Your Honor, I --

17 THE COURT: But Rule 3006 doesn't deal with that.

18 MR. CREMONA: But Rule 41 does and they've invoked
19 this as a contested matter. I think it is worth going
20 through that, but putting that aside, what I'm trying to
21 accomplish here, Your Honor, is to invoke the status quo.
22 They have no legal --

23 THE COURT: But she's still -- it's the same
24 thing. She would have to make a motion to withdraw her
25 claim under Rule 41 or withdraw whatever it is she --

1 MR. CREMONA: I agree, Your Honor. That's what --
2 I'm suggesting that --

3 THE COURT: All I'm saying -- let's do it this way
4 because we're going around in circles here. To the extent
5 they purported to withdraw their objection or their claim
6 without a motion, those acts are a nullity. With respect to
7 the claim, Rule 3006 applies for the reasons I've stated and
8 you have to make a motion.

9 With respect to the objection, it's part of a
10 contested matter. It's a pleading in a contested matter and
11 the effect of which would be, in their view, the termination
12 of a contested matter. That's why they're doing it. So
13 they have to make a motion on the Rule 41 to do that.

14 And let's just leave it at that. And then we can
15 go through them on a case-by-case basis. There may be some
16 cases where there's no dispute. I don't know. I doubt it,
17 but they all seem to be the same in terms of the legal
18 issues. And then we can get into the issue of well, gee, if
19 you can withdraw it -- a motion, what are the appropriate
20 terms or are there appropriate terms to permit you to
21 withdraw.

22 So doing it this way is... You know, beyond that,
23 and everything is without prejudice to your rights to make a
24 motion to withdraw or make a motion to withdraw their rights
25 to oppose and I don't have to resolve the jurisdictional

1 issue now because as long as I have a live claim before me
2 or what appears to be live claim -- and an objection by the
3 way -- what you're really trying to do, if that's the route
4 you want to go, why don't you just make a motion to withdraw
5 both the objection and the claim and basically consent to
6 the determination that you have no net equity which is what
7 you're really talking about. Right?

8 Then we can talk about what that means in terms of
9 the adversary proceeding.

10 MS. NEVILLE: I think you and I differ in what
11 that means.

12 THE COURT: I understand. I understand we differ
13 but you two sides differ also, so --

14 MS. NEVILLE: That's true.

15 THE COURT: That's why we're here.

16 MS. NEVILLE: I'm still not sure what the outcome
17 of this was --

18 THE COURT: Okay.

19 MS. NEVILLE: -- because I actually thought that
20 at one point I said well, why don't I just allow them to --
21 why don't I just agree to this motion. So I won't withdraw
22 my objections. What's the difference? There is no
23 prejudice to the adversary proceeding or to the claims
24 process by withdrawing it, just ministerial. So now, they
25 have to go forward and file this omnibus motion --

Page 67

1 THE COURT: Well, no, no, no.

2 MS. NEVILLE: -- listing the three cases.

3 THE COURT: You're saying it's ministerial but
4 it's procedurally improper.

5 MS. NEVILLE: Well, it's not procedurally improper
6 if they haven't answered in that particular adversary
7 proceeding.

8 THE COURT: In the adversary proceeding and the
9 claims objection.

10 MS. NEVILLE: And the claims --

11 THE COURT: Well, but they have --

12 MS. NEVILLE: -- contested matter.

13 THE COURT: You know, essentially --

14 MS. NEVILLE: It can't be both. It can't be that
15 those cases that went up to the Second Circuit are directly
16 a part of my claims resolution process and that they have
17 not finally disallowed the claim. It can't be that that
18 procedure where they have actually disallowed all of the
19 things that are raised in the objection have been ruled on
20 by the Second Circuit and that there's absolutely not
21 finality to the claim. That can't be. You can't keep
22 attaching --

23 THE COURT: But you're still --

24 MS. NEVILLE: -- an adversary proceeding that says
25 I'm not dealing with the --

1 THE COURT: You're still disputing the computation
2 of net equity. In other words, there are legal issues and
3 factual issues and even if all the legal issues are decided
4 against you, you're saying not only there are no fictitious
5 profits and as a consequence there is net equity because the
6 trustee hasn't correctly computed the ins and outs. This
7 wasn't a Ponzi scheme; there was actual trade. That's what
8 you're saying.

9 MS. NEVILLE: Let me --

10 THE COURT: I don't want to hear -- Ms. Neville, I
11 don't want to hear any more about this.

12 MS. NEVILLE: But I haven't really -- it really
13 clears it up for me.

14 THE COURT: I really --

15 MS. NEVILLE: It's different to say I do not have
16 a claim and the calculation for that equity is okay and I
17 have a defense under 548(c).

18 THE COURT: In terms of your motion, any attempts
19 to withdraw a claim or an objection in a pending contested
20 matter is a nullity without prejudice to their right to make
21 a motion to withdraw the claim under 3006 or to withdraw --

22 MS. NEVILLE: The objection.

23 THE COURT: -- their objection under Rule 41;
24 okay?

25 MR. DEXTER: Understood. Thank you, Your Honor.

1 THE COURT: All right. We don't have to deal with
2 the jurisdictional issue now but in response to a motion to
3 withdraw the claim or something like that, you can argue it
4 doesn't make a difference because there's still equitable
5 jurisdiction.

6 MS. NEVILLE: Let me ask you something.

7 MR. CREMONA: Your Honor, can I --

8 THE COURT: We're done.

9 MR. CREMONA: Can we submit an order the
10 memorialized Your Honor's ruling?

11 THE COURT: Yes. Now, next, I have one more
12 matter here.

13 MS. NEVILLE: That's not mine.

14 THE COURT: And this --

15 MR. DEXTER: I hope this will be a simple one,
16 Your Honor.

17 THE COURT: Well, the problem is Judge Moss has a
18 lot of paper in her little office. And the impression I got
19 -- and maybe there's an issue about what's still alive
20 before Judge Moss and what isn't and those papers can be
21 returned, destroyed, whatever it is just -- or you can
22 supply the documents on a disc or something like that. It's
23 a storage issue, basically.

24 MR. DEXTER: Okay, so how do you propose --

25 THE COURT: Why don't you tell me -- you don't

Page 70

1 have to do it this second -- but tell me what you think are
2 still live issues before Judge Moss. I understand this
3 trading records issue appears to still be a live issue, but
4 there must have been other issues that were referred to him
5 that are no longer live and it seems to me that those
6 records can be disposed of.

7 And maybe the answer is that to the extent there
8 are papers there that don't bear -- part of live dispute but
9 don't bear on any of the issues right now, you just retrieve
10 them and then you can resubmit them or something like but at
11 a minimum, let's find out what it is or what papers you
12 think are part of this live dispute; okay?

13 MR. DEXTER: Okay. So should we submit a letter
14 to Your Honor?

15 THE COURT: Yeah, you can submit a letter. You
16 know, you can respond also, but --

17 MR. DEXTER: Okay.

18 THE COURT: -- to the extent you can resolve the
19 storage issue --

20 MR. DEXTER: Okay.

21 THE COURT: -- it would be helpful.

22 MR. CREMONA: We're happy to help resolve --

23 THE COURT: Okay.

24 MR. CREMONA: -- verify what's still pending.

25 MR. DEXTER: Thank you, Your Honor.

Page 71

1 THE COURT: Maybe you'll surprise him. Actually,
2 copy him on the letter.

3 MR. DEXTER: Okay.

4 THE COURT: Because he may think he resolved
5 something and -- okay. You'll be back this afternoon, 2
6 p.m.

7 MR. DEXTER: Thank you, Your Honor.

8 THE COURT: All right.

9 MS. NEVILLE: Thank you, Your Honor.

10 THE COURT: Thank you.

11 (Recess)

12 THE COURT: All right. Apologize for the delay
13 but I had a conference on the phone. Picard versus Shapiro.

14 MR. ROLLINSON: Good afternoon, Your Honor. James
15 Rollinson here on behalf of the Trustee. With me is Torello
16 Calvani.

17 MR. MILLER: Good afternoon, Your Honor. Robert
18 Miller here for defendants.

19 MR. LAX: And Barry Lax. Thank you, Your Honor.

20 MR. ROLLINSON: Good afternoon, Your Honor. We're
21 here probably on something that's not your favorite subject,
22 a discovery dispute. We were -- we thought long and hard
23 before bringing it to your attention, but now that we're
24 moving into the next phase of that discovery we just want to
25 clarify a couple issues so that we're not faced with a

Page 72

1 situation a couple months down the road with some questions
2 unanswered.

3 The first area that we want to pin down is having
4 an assurance that the defendants have diligently searched
5 for and produced all document responsive to the Trustee's
6 request to which they were compelled to respond. And we
7 have some questions on that based on their productions.

8 THE COURT: What form would that -- all right, why
9 don't you tell me --

10 MR. ROLLINSON: Sure. And secondly, just an
11 explanation of why. I think we had expressed during the
12 last conference before Your Honor when we were arguing the
13 motion to compel. We hoped we weren't in a situation where
14 for approximately two years we're fighting over requests --
15 requests which were narrowed 15 months ago and we fight --
16 we waste a lot of resources including your own, Your Honor,
17 and there are no responsive documents.

18 So as it relates to David Shapiro, Mr. Shapiro's
19 younger son, he didn't produce one document in response to
20 any of our requests. The Citrons produced a total of 18
21 document, only five of which related to one of these core
22 accounts, as we call them. So we got virtually no
23 production from any of the two children after months and
24 months and months which had delayed this case moving forward
25 as far as depositions goes.

1 So we do have some open questions. Are there
2 still documents?

3 THE COURT: Well, let's get to the first question.
4 What is it that you think you need from them to confirm that
5 you've gotten all the documents that are responsive to your
6 request?

7 MR. ROLLINSON: Well, one, that they diligently
8 searched for them. Secondly, and explanation of to the
9 extent -- and we are a bit at a loss why these documents
10 don't -- wouldn't have existed and they would have been in
11 their possession. We asked for all account statements
12 relating to all accounts.

13 THE COURT: Are you going to take their
14 depositions?

15 MR. ROLLINSON: We are.

16 THE COURT: Why don't you just ask them at their
17 depositions?

18 MR. ROLLINSON: The problem is, and we were
19 talking before you came in, Your Honor, about scheduling
20 those. If we're two months down the road, we're taking
21 their deposition. There are open questions about documents.

22 THE COURT: What is it that you want from them?

23 MR. ROLLINSON: Well --

24 THE COURT: You want some sort of a statement from
25 each of the defendants individually? Is that what you're

1 looking for?

2 MR. ROLLINSON: Correct, to make sure that we do
3 have all responsive documents and an explanation of why
4 there aren't any documents. Why --

5 THE COURT: But that's -- ask them that at a
6 deposition and you can develop your arguments about
7 spoliation or whatever else you have. But they're going to
8 get up and they're going to tell me they produced all the
9 documents and it becomes a he said, she said issue and it
10 just makes more sense if you're going to take their
11 depositions anyway to establish these facts that you're
12 seeking to establish.

13 MR. ROLLINSON: And I agree that's, I think, a
14 sensible approach.

15 THE COURT: Because at the end of the day, they
16 may not have any more documents to turn over. Whether they
17 should or shouldn't have the documents is a different
18 question, but...

19 MR. ROLLINSON: Correct. I just don't want to be
20 in a position where two months down the road with two months
21 left in the discovery period which now we have a firm cutoff
22 and there's still questions about documents.

23 THE COURT: If it comes up in a deposition that
24 they have documents that are responsive and they didn't turn
25 them over, that would be a basis to extend the discovery,

Page 75

1 presumably. But we've been going at this for how many years
2 now.

3 MR. ROLLINSON: Agreed. Agreed, and we were
4 surprised that we didn't get any responsive documents. The
5 other point of confusion is that when the wrote to Your
6 Honor they indicated that they produced previously a number
7 of documents to us in connection with their Rule 2004
8 production.

9 THE COURT: I thought that was Stanley who
10 produced the documents.

11 MR. ROLLINSON: You're correct. There were no
12 documents from either of the children and I reviewed it and
13 confirmed that there were no accounts --

14 THE COURT: You know, this case has taken on a
15 satellite litigation over documents. You're going to take
16 their depositions anyway. You have what you have. Ask
17 them. Go through each of the requests if you think it's
18 appropriate. Say, you know, what'd you do to look for those
19 documents. What happened to the account statements? I
20 don't know if they were receiving them or Stanley was
21 receiving them but what happened to them?

22 MR. ROLLINSON: Well, it certainly gives us some
23 comfort if we're faced with a situation where they're
24 additional documents or there are issues that we're not
25 going to be backed up against the discovery cutoff and if

Page 76

1 there is an issue, we'll bring it to --

2 THE COURT: Do you have any doubt that if it turns
3 out one of them has a stack of account statements that
4 weren't turned over and there's a reason -- and you didn't
5 have them before and there's a reason to take -- to get more
6 discovery ruling, then I'll extend the discovery deadline.
7 But just take their deposition.

8 MR. ROLLINSON: Okay. Fair enough.

9 THE COURT: Now with respect to this issue of
10 spoliation, I assume you want to take the deposition first
11 anyway but you'd have to do that by a separate motion.

12 MR. ROLLINSON: Okay.

13 THE COURT: All right? Anything else?

14 MR. MILLER: Nothing for defendants, Your Honor.

15 THE COURT: Very good. So tell me what the
16 schedule is in this case now? I want to move it along. I'd
17 like to try this case.

18 MR. ROLLINSON: Currently we have a discovery --
19 fact discovery cutoff of the end of January. We were
20 conferring again, Your Honor, about scheduling depositions.
21 We don't have a ton of depositions, I think. Just as a
22 preview, I guess, we did file a motion, Your Honor, for a
23 Rule 30 order to depose Ms. Bongiorno who's incarcerated.
24 And I guess they'll formally --

25 THE COURT: A Rule 30 on behalf of BLMIS?

Page 77

1 MR. ROLLINSON: On behalf of the Trustee seeking
2 an order authorizing her deposition.

3 THE COURT: Do give testimony on behalf of BLMIS?

4 MR. ROLLINSON: On behalf to the Trustee, correct,
5 in this case.

6 THE COURT: No, wait. She's not a 30(b)(6)
7 witness or --

8 MR. ROLLINSON: No, no, no. As an individual. As
9 an individual.

10 THE COURT: Okay, but she's incarcerated. You
11 have to go through a separate procedure to take her
12 deposition.

13 MR. ROLLINSON: Yes, Your Honor. We filed that
14 motion. We're just bringing it to your attention. It might
15 not be on your radar but we filed that last --

16 THE COURT: When is that returnable?

17 MR. ROLLINSON: On next omnibus date in October.

18 THE COURT: Is there an objection?

19 MR. LAX: No, we're going to join in the motion,
20 Your Honor.

21 THE COURT: All right, so why don't you just
22 submit a --

23 MR. LAX: Stipulation?

24 THE COURT: -- a consent order.

25 MR. LAX: Okay. That's fine.

1 MR. ROLLINSON: Fair enough.

2 THE COURT: I mean, your firm has done several of
3 these already, so --

4 MR. ROLLINSON: Correct.

5 THE COURT: Okay, good.

6 MR. ROLLINSON: So we'll do that, Your Honor,.

7 THE COURT: All right. And besides Ms. Bongiorno
8 and the defendant, what other fact witnesses are there in
9 this case?

10 MR. ROLLINSON: If they're additional witnesses,
11 it's just a couple. We were talking about that. We weren't
12 quite sure. There's Mr. Konigsberg who is the accountant.
13 We were talking about there are a couple other former BLMIS
14 employees that are not incarcerated that we're talking about
15 but it's --

16 MR. LAX: Maybe Mr. Kugel.

17 MR. ROLLINSON: -- a very limited number. David
18 Kugel being one of them.

19 THE COURT: He's not incarcerated?

20 MR. ROLLINSON: He's not; no. And he's local. He
21 lives on Long Island, so...

22 THE COURT: All right. In terms of expert
23 discovery, I don't know if they're technically experts but I
24 assume you have your forensic accountants that have
25 reconstructed the accounts and they'll testify as to that;

1 right?

2 MR. ROLLINSON: Correct.

3 THE COURT: Do you want to take their depositions?

4 MR. LAX: I'm going to take their depositions,
5 Your Honor, and then I believe we may have some experts as
6 well. Because remember, Your Honor, these are not the split
7 strike strategy account. These are different accounts.

8 THE COURT: Are these the convertible overcharge
9 accounts?

10 MR. LAX: Yes.

11 MR. ROLLINSON: And then, Your Honor, there were --
12 - they're called the portfolio accounts. It can come under
13 different names, but they were the accounts managed or
14 administered by Ms. Bongiorno which were the long-term buy
15 and hold. That was -- when we talk about the core accounts,
16 those are those accounts.

17 THE COURT: She should have a pretty good
18 knowledge of the business judging from the PW proceeding.

19 MR. ROLLINSON: She does.

20 THE COURT: Okay. And how long do you think that
21 -- do you already have expert reports as to this particular
22 case prepared?

23 MR. ROLLINSON: I think that as far as the
24 forensic experts go, those will -- they're probably not
25 prepared yet because there's sort of a pipeline for those,

Page 80

1 but those will be prepared and served, I believe in the time
2 that is provided in the amended case management order. And
3 we have Mr. Dubinsky as well.

4 THE COURT: Okay.

5 MR. LAX: And then, Your Honor, there is an
6 outstanding subpoena right now by the Trustee to --

7 THE COURT: For who?

8 MR. LAX: -- JP Morgan Chase. I believe they
9 filed their responses and objections last night and it's for
10 Stanley Shapiro's loan documentation for his mortgage from
11 1995. So we do plan to move to quash that subpoena.

12 THE COURT: On what basis?

13 MR. LAX: I don't know what the relevance is for a
14 1995 mortgage on his apartment in Manhattan -- the loan
15 documentation.

16 THE COURT: Do you have standing to move to quash
17 a third-party subpoena other than on privacy grounds?

18 MR. LAX: On privacy grounds?

19 THE COURT: Other than privacy grounds.

20 MR. LAX: I believe relevance grounds, Your Honor.

21 THE COURT: No, I know I have a decision about
22 this, I think, in this case also.

23 MR. ROLLINSON: I think I heard argument on it,
24 actually.

25 THE COURT: Okay.

1 MR. ROLLINSON: The one thing --

2 MR. LAX: I will make sure to --

3 THE COURT: Yeah, I know. I've had that issue a
4 couple of times about the standing of a party to object to a
5 non-party subpoena. For example, sometimes I get an
6 objection on burdensome grounds, and my response is, "Well,
7 if the subpoenaed party isn't saying it's burdensome, why
8 are you saying its burdensome?" And I had somebody say,
9 "well, then I have to look at the stuff." After they told
10 me that it was irrelevant. My response is, "Well, if it's
11 irrelevant, why are you looking at it?"

12 MR. LAX: but, Your Honor, it'd be the same thing
13 if they tried to subpoena for his financial records.

14 THE COURT: Well, financial records and personal -
15 - you always have a right to object on privacy grounds.

16 MR. LAX: Right.

17 THE COURT: But he is a party and the financial
18 disclosures he made may be relevant to his BLMIS accounts.

19 MR. LAX: Maybe.

20 THE COURT: Okay. It's not a very high threshold
21 to meet; you know.

22 MR. LAX: Okay.

23 MR. ROLLINSON: And the one thing we're trying to
24 see --

25 THE COURT: I'm not saying don't make the motion,

1 I'm just --

2 MR. LAX: Okay.

3 THE COURT: I've dealt with this issue, I know, a
4 couple time.

5 MR. LAX: Okay.

6 MR. ROLLINSON: And we're just -- one thing we're
7 trying to -- which we did at the outset is with JP Morgan
8 Chase's counsel, first we want confirmation from him whether
9 any documents even exist responsive to the subpoena and
10 obviously if they no longer have any documents responsive,
11 then it moots the --

12 THE COURT: When was --

13 MR. ROLLINSON: -- and we're happy to withdraw the
14 subpoena.

15 THE COURT: When was the loan no longer
16 outstanding?

17 MR. ROLLINSON: I believe it was in 1998.

18 THE COURT: That's about the cutoff date for the
19 documents from --

20 MR. ROLLINSON: It could be close. We just don't
21 know. We got their objections last night which was a little
22 unclear of whether --

23 MR. LAX: I would say it was very unclear.

24 MR. ROLLINSON: It said to the extent we have
25 documents, we'll produce them so we just have to --

1 THE COURT: So ask them when they're going to
2 produce them, then.

3 MR. LAX: Right, and then we'll move before that.

4 THE COURT: All right.

5 MR. ROLLINSON: That's all.

6 THE COURT: Okay, so let me schedule, I guess,
7 another status conference. You say your fact discovery is
8 ending at the end of January.

9 MR. LAX: End of January. Yep.

10 THE COURT: Say February 7th --

11 MR. ROLLINSON: Okay.

12 THE COURT: For conference.

13 MR. ROLLINSON: That's fine, Your Honor.

14 MR. LAX: Thank you, Your Honor.

15 THE COURT: Okay, thank you.

16 (Whereupon these proceedings were concluded at
17 2:25 PM)

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1 | INDEX

2

RULINGS

4

6 Motion to Strike Denied Without Prejudice 63 14

18

11

12

13

1

18

88

21

22

23

Page 85

1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certified that the foregoing
4 transcript is a true and accurate record of the proceedings.

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8 Sonya Ledanski Hyde

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24

25 Date: September 27, 2018

[& - administrative]

Page 1

&	2012	26:13,18	436	33:12	accountant	78:12
& 5:7 6:5	2014	57:9	45	4:5	accountants	78:24
0	2015	6:14 58:3	455	5:2	accounts	72:22
08-01789	2016	3:2 56:23		5		73:12 75:13 78:25
1:5 3:1	2017	9:14	502	54:21		79:7,9,12,13,15
3:5	2018	2:19 85:25	502d	16:5 18:19		79:16 81:18
08-99000	21	12:18		18:23	accurate	54:24
1:3	21st	12:12	52	8:5		56:25 85:4
1	24	14:11	548	68:17	acknowledge	46:22
11:10	26	2:19 57:9	548c	18:3	acknowledged	13:22 63:25
10	27	85:25		6	act	14:14 33:15
35:7 40:13	29	11:10	6	77:6		44:5
48:21,22 60:13,14	2:25	83:17	63	84:6	action	19:3 40:1,6
10-04390				7	actions	35:19
1:15 3:9			7041	28:24		47:12
6:10			78	35:19,24	actively	26:6
10-05383			7th	83:10	acts	65:6
2:1 3:11					actual	22:17 23:4
1000	3		9			34:13 68:7
4:20	3	16:22	9014	14:13 17:3	ad	18:2
10004	30	19:14 76:23,25		41:17	add	10:14 55:8
2:17		77:6		a	additional	41:1
10018	300	85:22	ability	25:18		64:2 75:24 78:10
5:9	3005	33:15	able	11:21 59:12	address	14:6,8
10020	30056	14:25	absence	37:16		16:17 34:9 56:16
4:15	3006	8:9,15,24		59:9	addressed	33:4
10022		25:12 28:20 29:5	absolute	31:4,12	addresses	17:4
5:3		29:6,13 30:21,22		31:13 32:15 44:14	adequacy	11:3
10111		31:5,6,10,14 32:3		44:19		12:2
4:6		33:14 41:6,10,11	absolutely	46:14	adhered	57:4
10:05		44:15,16 54:13		64:10 67:20	adjourn	44:23
2:20		64:6,17 65:7	abundantly	57:12	adjudicated	47:3
10th		68:21	academic	36:25		47:22 64:8
62:5		301		53:11	adjudication	48:5
11501		33:12	acceptance	44:17	adjudicative	7:15
85:23		305		60:16		11:18 54:18
11th		44:11	accomplish	10:16	administered	64:8
9:20		31		64:21		79:14
12		9:11,14	accorded	14:12	administrative	20:22
49:4		330		36:18		
1221		85:21	account	38:24,25 73:11		
4:14		35th		75:19 76:3 79:7		
14		5:8				
40:12 44:10		3rd				
84:6		61:6				
1450		4				
5:8		4				
15		3:2				
9:21 10:15 11:9		40				
49:16 50:10 51:22		40:12				
58:6 72:15		41				
1667		8:22,25 17:3				
4:20		28:24 29:3,5,6,14				
18		29:15 34:6 41:2				
72:20		41:13 49:21 64:18				
1995		64:25 65:13 68:23				
80:11,14						
1998						
82:17						
2						
2						
71:5						
20/20						
41:20						
20006						
4:21						
2004						
75:7						
2009						
6:21						

[admittedly - basically]

Page 2

admittedly 40:5 adv 1:5,15 2:1 adversary 11:19 17:9,14,25 18:10 21:19 24:5,24 25:3,5 36:12 41:22 42:6 45:16 47:18 50:22,23 66:9,23 67:6,8,24 affect 24:12 26:3 33:7,7 40:2 50:21 affirmation 12:14 affirmative 15:22 afforded 42:24 afternoon 71:5,14 71:17,20 agenda 6:8 ago 58:25 61:1 72:15 agree 7:3,3 26:24 27:23 44:24,25 65:1 66:21 74:13 agreed 75:3,3 ahead 8:20 16:10 28:18 50:9 57:23 al 1:12,23 2:11 alaska 24:11 alive 69:19 allocated 46:6 allow 10:2 14:22 15:7 20:2 36:21 37:15 66:20 allowance 20:1 23:17 42:6 46:10 47:11 48:1 allowed 26:7 amended 3:3 80:2 amendment 63:8 63:9 americas 4:14 amounts 36:8 analogous 41:25	analysis 28:3 43:11 anat 4:9 6:6 andrew 5:18 answer 15:6,23 20:16 29:20 32:13 70:7 answered 7:9 28:25 29:16 67:6 anybody 52:3 anyway 29:7 46:9 51:7 74:11 75:16 76:11 apartment 80:14 apologize 58:8 71:12 apparently 51:12 56:13 appearing 5:14 6:5 appears 55:6 66:2 70:3 appellate 49:9 appended 14:10 applebaum 34:11 34:13 applicability 16:18,25 applied 64:7 applies 16:5 25:12 41:14 63:24 64:6 65:7 apply 28:20,24 29:3 appointing 3:2 approach 74:14 appropriate 42:17 47:8 48:10 63:20 65:19,20 75:18 approximately 72:14	arbitrator 3:2 area 72:3 aren't 74:4 argue 8:13 63:12 63:14 69:3 argued 18:2 arguing 19:2 29:4 31:3 72:12 argument 13:7,10 19:25 26:10 37:4 54:21,25 80:23 arguments 46:23 56:12 74:6 articulated 12:3 12:23 15:2,4 40:25 aside 8:21 30:25 57:15,21 64:20 asked 23:17 51:24 56:5,11 60:23 73:11 asking 20:25 23:10 31:9 53:22 57:8 58:3 aspect 26:1,2 asserts 8:6 assume 38:22 42:8 76:10 78:24 assurance 72:4 attached 15:22 25:4 attaches 28:5 attaching 67:22 attempt 16:25 57:5 attempted 8:8 34:1 62:4 attempts 68:18 attention 43:1,5 71:23 77:14 attorneys 4:4 authority 7:15 11:18 32:22 54:19	authorizing 77:2 automatically 18:18 available 59:22 61:4 avenue 4:14 5:2 avoid 11:12 50:2 avoidance 12:21 13:21 15:20 16:7 47:12 avoiding 54:6 avoids 26:4 aware 55:10 57:2 57:10,14 59:2 62:19
b			
		aside 8:21 30:25 57:15,21 64:20 asked 23:17 51:24 56:5,11 60:23 73:11 asking 20:25 23:10 31:9 53:22 57:8 58:3 aspect 26:1,2 asserts 8:6 assume 38:22 42:8 76:10 78:24 assurance 72:4 attached 15:22 25:4 attaches 28:5 attaching 67:22 attempt 16:25 57:5 attempted 8:8 34:1 62:4 attempts 68:18 attention 43:1,5 71:23 77:14 attorneys 4:4 authority 7:15 11:18 32:22 54:19	b 2:21 77:6 back 11:20 25:11 28:9 33:14 35:20 41:5 52:12 60:23 71:5 backed 75:25 background 6:11 baker 4:3 6:5 bam 1:23 6:12 44:23 53:12,16 54:2 55:3,9,13 59:16 bankruptcy 1:1 2:15,23 8:9 16:18 30:25 31:7,19 32:10 33:12,15,19 34:2 39:14 40:7 40:11 44:6 64:9 barely 27:5 barry 5:11 71:19 based 7:16 14:9 23:23 26:16 39:1 41:4 72:7 bases 40:24 basically 26:22 48:10 66:5 69:23

[basis - claim]

Page 3

basis 24:9 34:3 39:25 40:22 65:15 74:25 80:12 bear 70:8,9 began 34:8 behalf 6:5,7,18 8:5 17:7 30:5 58:19 71:15 76:25 77:1,3,4 belaboring 58:8 belated 57:5 believe 24:3 25:22 35:18 44:1 47:20 52:20,22,25 53:2 79:5 80:1,8,20 82:17 bell 5:15 benefit 44:21 bernard 1:12,19 2:6,8 berNSTein 2:22 better 55:1 beyond 36:2 65:22 big 51:19 bigger 49:6 bit 73:9 blmis 4:4 76:25 77:3 78:13 81:18 bongiorno 76:23 78:7 79:14 bound 12:23 28:1 bowling 2:16 brief 33:9 47:7 48:20,20 briefing 39:23 41:2 43:18 49:16 53:6 64:2 briefings 48:16 briefly 8:11 16:17 56:17 briefs 40:13	bring 9:23 76:1 bringing 10:24 71:23 77:14 broadway 5:8 brought 43:1,5 burdensome 81:6 81:7,8 business 79:18 buy 79:14 c c 4:1 6:1 68:17 85:1,1 calculate 26:1,2 28:15 calculated 27:22 calculation 36:1 68:16 calendar 62:3 call 72:22 called 49:3,3 79:12 calvani 4:10 71:16 can't 7:3,23 9:25 11:8 15:11 16:6 23:5,6 29:5 31:22 33:1 38:4 40:9 41:10 47:20 58:9 67:14,14,17,21,21 carol 17:6 54:3 carole 4:17 case 1:3,5,15 2:1 3:1,5,9,11 6:10,12 6:13 7:4,7 9:4 10:6,11 13:6,22 17:25 18:7,8,9,17 21:10 22:7,23 23:4,18 25:2 26:5 26:6 28:24 31:25 32:25 33:11,20,24 34:9,10,19,25 35:4,9 37:14,17 37:17,19 41:20 44:10,20,21 48:11	51:1,3,20 54:3 60:9,14,25 65:15 65:15 72:24 75:14 76:16,17 77:5 78:9 79:22 80:2 80:22 cases 9:8,10,24 10:12,15,17 12:16 18:1 25:1,7,9,17 28:10 30:9,11,12 31:24 33:13 34:20 35:2 40:3,5,7,9 42:1,23,25 43:10 43:19,20 44:2 48:7 54:1,7 55:14 58:6 62:3,15 63:19 65:16 67:2 67:15 cause 3:1 19:3 certain 8:3 59:18 certainly 42:16 75:22 certified 85:3 chairman 5:1 chaitman 39:22 50:11 58:15 challenged 24:15 chance 51:13 59:4 change 53:5 changes 33:7 chapman 8:4 26:9 30:5,6 characterization 29:23 chase 80:8 chase's 82:8 chatman 22:13 checks 28:11 cheryl 6:12 children 72:23 75:12 choice 25:18	circles 65:4 circuit 9:3 19:5,24 21:11 24:7 25:23 26:22 62:20,22 63:11,15 67:15,20 circumstance 23:16 circumstances 21:10 32:25 circumvent 12:5 cited 48:7 citrons 72:20 civil 29:2 43:24 claim 3:6,7 7:16 8:3 10:3 11:4 12:19 13:15,19 14:4,10,15 16:6,6 18:11,14,18,23 19:10,15,19,22 20:3,4,9,11,13,15 21:1,2,8,9,14,21 21:24 22:3 24:9 25:2,24 26:18,20 27:3,11,18 28:14 29:13,21 30:8,17 30:18,23 31:1,4,7 31:13,21,22 32:4 32:7,9,15,18 33:17,22,25 34:1 34:2,17,25 35:6,8 36:5,7,21,22 39:2 39:4,24 40:1,10 40:19 41:7,10,21 41:25 42:2,9 43:7 43:9 44:5,12,14 45:6,14 46:21 50:4,5,20,21,24 51:19 52:16,25 54:21 55:7 59:7,9 59:10,14 61:24 62:4,13 63:10,22 64:25 65:5,7 66:1 66:2,5 67:17,21
---	--	---	---

[claim - couple]

Page 4

68:16,19,21 69:3	closed 58:3,24	conclusion 10:3	contemplation 30:23
claimants 8:6	60:10,11	condition 20:25	contest 28:13 30:7
50:12	cohen 12:22	20:25 36:20	contested 14:8,13
claims 6:18,20	coin 17:17	conditions 14:16	14:15 17:2 29:16
11:1,14,16 12:8	collateral 48:6	21:25 47:4,8 52:2	41:14 42:4 64:19
12:10,20 13:8,9,9	colleague 6:6	conduct 55:5	65:10,10,12 67:12
13:17,17,23 14:2	collier's 40:12	confer 25:24	68:19
14:10 15:5,8,9,15	44:10	37:12	
15:19 16:2 17:8	colloquy 44:13	conference 3:9,11	context 6:11
18:9 19:5,9 20:1,6	come 32:21 46:8	6:10 9:11 42:18	43:24 44:1
20:8,14,17 21:15	52:12 79:12	44:24 56:18 62:5	continue 30:14
21:17 23:8,16,17	comes 74:23	71:13 72:12 83:7	37:15 51:13
24:5,10,11 25:2	comfort 75:23	83:12	contrary 18:13
25:12,21,25 26:3	coming 55:10	conferred 54:18	contravene 15:7
26:10,16 27:4,8	commenced 40:1	59:17	contravenes 37:16
27:15,17 29:24	comments 49:12	conferring 76:20	contravening 14:23
32:23 34:11 35:21	compel 72:13	confirm 21:10	control 42:22
35:23,24 37:1	compelled 72:6	73:4	convenient 59:19
38:24 39:18 41:12	compelling 63:5	confirmation 55:24 56:13 57:15	convertible 79:8
42:6 43:2 45:16	complain 26:5	82:8	convince 18:17
46:10 47:11,14,25	complaint 18:4,11	confirmations 55:21,22 56:1,5,5	copy 39:9,10 71:2
51:6 52:5,6,13,20	25:20 28:4 29:20	58:5	core 15:23 72:21
53:9,11 54:9,16	29:23,24 30:8,17	confirmed 75:13	79:15
61:22,22 64:14	31:18 41:22 42:1	confusion 75:5	corporation 1:9
66:23 67:9,10,16	42:2,3	conjoined 14:15	4:19 16:16
clarified 54:11	complete 57:1	connection 18:12	correct 7:5 38:16
clarify 50:1 57:8	completed 6:13	45:8 58:15 75:7	52:19 53:4 54:17
71:25	6:14,14	consent 66:5	55:15 74:2,19
clarity 53:24 62:3	completely 20:10	77:24	75:11 77:4 78:4
clear 12:3,7 25:23	21:18 38:18	consequence 24:1	79:2
28:23 35:22 39:8	comply 58:4	68:5	correctly 27:22,25
39:11,17 44:13	computation	consider 16:22	68:6
52:18 53:2,3,25	17:19,20 18:6,6	68:6	couldn't 23:1 31:1
57:10,11,12 62:2	34:18 68:1	considered 54:5	36:11 44:24,25
clearly 11:12 12:5	computed 68:6	consolidated 2:6	counsel 82:8
41:14,16 47:23,25	computing 46:12	47:10	counterclaim 25:3
clears 68:13	concede 27:24	constructed 44:18	country 85:21
client 15:13	concerned 59:8	contemplate 30:10	counts 49:10,10
clients 23:11,13	conclude 43:8	contemplates 31:18 32:6	49:14
26:10 39:22 50:10	50:18,19,24 64:12		couple 28:19 33:3
58:19	concluded 61:1		43:18 62:14 71:25
close 28:6 32:25	83:16		
34:15 82:20			

[couple - deemng]

Page 5

72:1 78:11,13 81:4 82:4 court 1:1 2:15 6:2 6:22 7:2,6,10,20 7:25 8:10,13,18 8:20 9:5,14,25 10:6,7,10 13:2,7 13:17,24 14:1,6 14:16,20 16:1,9 16:13,21 17:5,11 17:15,19,23 18:5 18:16,22,25 19:2 19:7,12,17,22 20:2,8,12,15,19 20:20,24 21:5,11 21:13,15,20,24 22:2,9,12,24 23:2 23:14,19,22 24:2 24:8,13,16,19 25:7,9,14,18 26:8 26:13,24 27:7,11 27:16,19,21 28:1 28:7,12,18,22 29:2,6,11,19,25 30:3,11,14,15,20 30:24 31:2,7,9,12 31:15,18,19,20,22 32:2,5,7,8,14,20 33:2,17 34:11,16 34:21,24 35:6,10 35:17 36:13,15,20 36:24 37:6,18,21 37:24 38:10,13,17 38:22 39:1,10,14 39:17,20,22 40:11 40:18,22 41:9,11 41:15,18,24 42:7 42:11,14,21,25 43:13,17,22 44:3 44:9,20 45:5,12 45:15,21,24 46:3 46:5,5,16,18,24 47:4,7,13,20 48:3	48:9,15,21 49:1,4 49:8,12,17,20 50:3,9,14,18 51:4 51:8,12,16,24 52:3,9,12,16,23 53:8,15,18 54:7 54:15,23 55:1,4 55:13,17,24 56:2 56:6,9,20,22 57:16 58:11,18,22 59:19,20,23 60:2 60:6,9,17,22 61:5 61:11,15,20 62:1 62:6,8,22,24 63:2 63:5,9,11,14 64:5 64:11,17,23 65:3 66:12,15,18 67:1 67:3,8,11,13,23 68:1,10,14,18,23 69:1,8,11,14,17 69:25 70:15,18,21 70:23 71:1,4,8,10 71:12 72:8 73:3 73:13,16,22,24 74:5,15,23 75:9 75:14 76:2,9,13 76:15,25 77:3,6 77:10,16,18,21,24 78:2,5,7,19,22 79:3,8,17,20 80:4 80:7,12,16,19,21 80:25 81:3,14,17 81:20,25 82:3,12 82:15,18 83:1,4,6 83:10,12,15 courts 8:23 court's 11:13 12:5 13:16 15:12 33:5 33:8,19 34:2 39:25 40:2,6 50:5 50:21 cover 26:22,24	creditor 21:14 31:13 32:4 cremona 4:8 6:4,5 6:25 7:5,8,12,24 8:2,16,19,21 9:7 9:15 10:5,8,11 13:11,19,24,25 14:5,7,18,21 16:4 16:11 35:11,14,18 35:22,24 36:14,16 36:23 37:5,7,23 38:1,6,13,16,21 39:8,11 40:24 41:13,16,19 42:15 42:22 43:12,15 45:1 46:14,20,25 47:2,24 48:7,17 49:23 50:1 52:18 52:25 53:24 54:11 54:17,22,24 55:15 56:10,12,16,21,23 56:25 57:20 59:17 59:21,25 61:3,9 61:19 62:2,7,18 63:3,23 64:10,15 64:18 65:1 69:7,9 70:22,24 currently 38:3 76:18 customer 56:4 customers 17:7 cutoff 74:21 75:25 76:19 82:18 d d 6:1 54:21 84:1 d.c. 4:21 damages 26:16 39:1 daniels 7:9,14,18 9:18 11:25 13:4 16:21 25:14,16 54:4,8 62:24 64:6	daniels' 11:7,14 14:23 data 57:13 date 77:17 82:18 85:25 dates 37:14 59:18 59:20 61:2 62:8 david 5:17 72:18 78:17 day 23:3 28:15 74:15 days 19:14 59:25 deadline 76:6 deal 6:23 7:10 29:24 34:5,5 40:4 41:11 42:7,9 43:21 53:9,13,18 59:5 61:23 62:9 62:10 64:17 69:1 dealing 53:1 67:25 deals 40:12 dealt 82:3 december 59:22 61:6 decide 21:7,8,9,12 52:13 decided 16:21 62:25 68:3 decides 18:17 deciding 33:13 decision 11:7,8,14 12:22 14:23 16:5 26:14,15 33:11 34:4 47:10 51:3 80:21 decisions 34:9 54:4 declaration 15:2 deemed 19:15,19 34:13 deeming 59:6
---	---	--	--

[defeat - documents]

Page 6

defeat 33:23 40:10 50:25 defeating 33:18 defendant 8:6 12:18 78:8 defendants 1:13 1:24 2:12 6:19 30:5 51:9 52:21 63:7 71:18 72:4 73:25 76:14 defense 48:13,14 60:2 68:17 defenses 15:23 48:11 defer 43:16 definition 8:22 delaware 43:20 delay 9:22 10:1,8 10:10 11:20,25 33:23 57:23 71:12 delayed 12:24,25 72:24 demonstrated 9:8 denial 6:20 54:11 denied 62:15 64:1 84:6 dentons 4:13 8:5 17:7,7 dentons' 14:11 deny 36:25 52:8 63:15 dependent 50:24 depose 76:23 deposition 58:16 73:21 74:6,23 76:7,10 77:2,12 depositions 72:25 73:14,17 74:11 75:16 76:20,21 79:3,4 deposits 22:5,17 22:20,23 23:5 27:22 28:3 47:15	47:16 described 13:13 destroyed 69:21 detail 8:12 determination 3:7 19:14 22:5 23:7 28:2 29:19 47:14 48:2 66:6 determinations 12:14 determine 8:23 27:3,21 32:22 40:3 determined 9:18 9:19 20:18 27:18 30:18 33:6 40:6 develop 74:6 dexter 5:5 30:1,2 30:4,4,12,15,22 31:6,11,16,21,23 32:2,6,11,17,21 39:19,21 40:16 44:13 47:9,19,21 47:25 48:18 49:15 49:18 51:22,23 52:4,7,11,15,19 53:3,4 61:23,25 62:17,19,23 63:1 63:7,12 68:25 69:15,24 70:13,17 70:20,25 71:3,7 didn't 19:10 20:6 22:13,22 27:4 28:15 35:6 39:4 43:3 44:19 58:4,6 59:1 63:20 72:19 74:24 75:4 76:4 differ 17:20 35:1 66:10,12,13 difference 28:8 29:12 42:10 62:14 66:22 69:4	different 12:17 20:7,24 25:7,9 29:9 34:16 35:1 51:1,3 54:10,10 68:15 74:17 79:7 79:13 diligence 10:24 11:5 diligently 72:4 73:7 direction 25:5 directive 13:1 37:13 directives 11:24 directly 11:13 14:23 67:15 directs 29:6 disagree 27:19,19 disallowance 19:19 25:11 34:13 34:13 53:14,15,16 disallowed 18:19 19:15 20:18 21:1 21:3,5,6 26:11 35:4,8,23,24 38:9 38:14,17,19,20 39:2,4,5,6 67:17 67:18 disavow 15:12 disc 69:22 disclosed 57:11 disclosures 57:9 57:10 81:18 discovery 3:2,11 6:13,14,15 14:13 22:16 55:11 58:1 58:3,5,6,24 60:17 71:22,24 74:21,25 75:25 76:6,6,18 76:19 78:23 83:7 discovery's 60:9 60:11	discuss 6:17 12:8 23:13 33:24 discussed 23:11 23:20 disingenuous 57:14 dismissals 30:9 dismissed 31:25 35:19 40:8 dispose 7:15 11:19 disposed 12:11,13 15:4 70:6 disposition 48:10 dispositions 28:5 dispute 45:22,25 46:6 58:1,13 65:16 70:8,12 71:22 disputes 22:16 54:9 59:1,2,2 60:18 disputing 34:17 68:1 disregard 15:8 disregarding 13:14 distinction 41:7 distribution 23:10 distributions 45:7 district 1:2 10:7 13:2 46:5 55:4 divorce 13:23 docket 42:23 document 58:15 58:18 72:5,19,21 documentation 80:10,15 documents 22:25 55:19 57:12,23 60:15 61:12 69:22 72:17 73:2,5,9,21 74:3,4,9,16,17,22
--	--	---	--

[documents - fight]

Page 7

74:24 75:4,7,10 75:12,15,19,24 82:9,10,19,25 doesn't 17:22 18:8,11,25 19:19 24:11 25:16,25 26:3 27:5 29:24 32:8,16 41:11 42:11 43:9 50:20 50:25 64:17 69:4 dog 6:24 doing 20:21 33:16 33:16 40:20 42:9 45:18 59:14 65:12 65:22 don't 6:23 7:3,10 7:12,22,25 8:15 14:6 19:13 21:3,5 21:7,9,12,21 22:19 23:10,14,19 25:23 27:9,10,23 30:14,22 31:16 32:12,15 33:7 35:10 42:7 43:10 43:22 44:1,13 46:6 47:19,21 49:7,21 50:10,14 51:4,8,21 52:13 52:22 53:2 59:10 59:13 61:20 62:10 63:3,9 64:1 65:16 65:25 66:4,20,21 68:10,11 69:1,25 69:25 70:8,9 72:9 73:10,16 74:19 75:20 76:21 77:21 78:23 80:13 81:25 82:20 doubt 25:10 65:16 76:2 doubts 30:19 drafted 31:17	dubinsky 80:3 duplicative 11:2 duty 9:23 e e 2:21,21 4:1,1 6:1 6:1 84:1 85:1 earlier 40:25 early 23:17 easy 49:21 ecro 2:25 edification 6:18 effect 48:6,7 62:16 63:4 65:11 effectively 29:20 efficient 37:9 effort 11:1,12 12:5,7 either 43:6 75:12 embracing 13:13 employees 78:14 enormous 11:25 entered 12:12 entertain 50:23 entire 15:8 enumerated 9:3 equitable 10:4 11:13 13:16 20:16 21:10,14 24:9 25:24 27:8,14 34:2,3 39:25 40:2 40:10 44:6 50:6 50:21,22 69:4 equity 17:12,21 18:1,6 23:6 26:15 34:18 35:19 36:1 46:12 48:2 66:6 68:2,5,16 equivalent 42:2 43:7 50:4 escape 44:5 essence 41:24 essentially 26:11 31:3 67:13	establish 24:4 35:1 74:11,12 established 16:7 22:6 46:7 estate 2:7 59:13 estoppel 48:6 et 1:12,23 2:11 eve 56:18 event 35:2 everybody 33:3 evidence 10:10 46:7,8 exactly 15:13 38:20 46:19 58:9 example 9:8 22:2 81:5 exceeding 40:13 exchange 61:11 exchanging 56:12 excuse 35:19 exds 33:12 exercising 24:9 exhibit 61:18 exhibits 61:17 exist 82:9 existed 55:22 57:15 73:10 existing 58:4 exists 40:8 expeditiously 11:22 expense 11:2,2 expert 6:15 59:18 78:22 79:21 experts 37:12 59:21 78:23 79:5 79:24 explain 32:2 explanation 11:4 12:2 72:11 73:8 74:3 expressed 72:11	extant 7:17 extend 49:16 74:25 76:6 extent 10:25 27:14 38:14 44:18 63:18 64:5,8 65:4 70:7,18 73:9 82:24 f f 2:21 85:1 faced 71:25 75:23 fact 6:14 7:16 25:6 32:7 40:11 44:25 76:19 78:8 83:7 factor 10:9 54:5 factors 9:2 10:21 10:23 12:1 32:24 33:21 35:1 facts 11:17 57:1 58:8,10 74:11 factual 18:5,5 68:3 fair 76:8 78:1 familiar 11:17 12:10 far 12:4 29:22,23 47:22 59:8 72:25 79:23 favor 10:22 54:6 favorite 71:21 february 6:13,14 83:10 federal 16:18 17:3 29:2 feel 17:8 felt 23:15 fetched 29:23,23 fictitious 17:11,20 18:7 23:5 26:2 46:12 68:4 fight 72:15
---	---	---	--

[fighting - hate]

Page 8

fighting 29:12 72:14 file 19:13 31:21 31:22 32:9 56:4 66:25 76:22 filed 6:18,21 8:4 9:17,19 11:7 14:9 14:10 15:22 18:11 18:14 19:17 25:2 25:3 27:8 32:7 33:6 40:6 41:21 50:22 55:11 77:13 77:15 80:9 filings 10:25 17:2 20:21 21:9,14 25:24 29:10,20 30:23 31:18 50:24 62:20 final 7:14,15 11:18 54:18 finality 16:8 20:1 67:21 finally 12:16 20:17 27:3,18 67:17 financial 81:13,14 81:17 find 40:9 70:11 fine 37:7 40:16 57:22 61:8 77:25 83:13 finish 26:13 46:3 60:22 firm 8:5,5 30:4 74:21 78:2 firms 51:10 first 7:11,21 8:8 20:3 24:22 40:11 42:25 46:6 54:7 55:9 59:22 61:3 72:3 73:3 76:10 82:8	fit 7:19 five 72:21 fix 62:8 floor 5:8 focusing 58:16 follow 24:13 63:20 font 48:24 49:4 footnote 16:22 foreclosed 46:22 foregoing 85:3 forensic 78:24 79:24 forget 27:7 31:9 form 72:8 formally 76:24 former 78:13 forum 13:1 32:1 forward 9:24 10:1 10:13 37:13 42:17 43:3,10 46:8 48:15 66:25 72:24 found 54:17 four 10:12 54:3 60:10 fours 33:11 foxes 56:13 frankly 16:19 fraud 45:11 fraudulent 18:18 front 55:18 fully 61:3 functional 42:2 43:7 50:4 further 15:6 16:12	general 30:24 33:5 generation 49:2 geographic 24:20 geographically 24:14 georgia 49:4,4 getting 35:15 44:21 51:7 give 23:9 59:4 61:17 63:7 77:3 given 60:16 gives 28:24 61:6 75:22 giving 48:11 go 8:20 9:3 10:13 10:20 11:16,22 12:4 16:10 24:20 28:9,18 29:5 43:10,10 48:11 50:9 55:16 56:14 57:16,22,23 58:22 59:5 65:15 66:4 66:25 75:17 77:11 79:24 goal 9:23 10:16 god 49:11 goes 20:22 33:14 47:21 60:23 72:25 going 6:17 7:7 8:13 10:1,15 13:8 16:22 18:12,14 23:12,16 24:12 25:4,5 32:1,23 33:8 36:5,6,10 37:12,14 40:25 46:21 50:12,13,16 50:25 51:14 52:7 52:8 53:21,22 54:23 55:1,2 57:5 57:25 58:23,24 59:4,24 60:5,24 61:13 63:12 64:19	65:4 73:13 74:7,8 74:10 75:1,15,25 77:19 79:4 83:1 good 6:2,4 17:6 30:2,3 43:8 71:14 71:17,20 76:15 78:5 79:17 gotten 73:5 governs 29:13,14 grant 64:5 granted 8:7 64:4 granting 10:22 great 24:21 green 2:16 greg 30:4 gregory 5:5 grounds 80:17,18 80:19,20 81:6,15 guess 37:6 45:17 46:10 52:1,8 61:20 63:15 76:22 76:24 83:6
		h	h 1:19 2:5 4:10 5:15 hadn't 53:20 half 36:9 hand 15:11 39:9 happen 10:13,16 47:22 51:15 happened 25:4 42:20 75:19,21 happening 15:14 happy 7:18 10:20 11:16 39:9 42:16 47:24 54:25 55:16 70:22 82:13 hard 71:22 harmed 32:18 hasn't 34:14 56:20 68:6 hate 64:12

[haven't - issue]

Page 9

haven't 10:18 15:18 28:7,9,25 29:16 37:24 57:16 58:23 59:14 60:15 67:6 68:12 hawaii 24:12 hear 7:20 16:13 28:16 29:25 34:17 68:10,11 heard 32:9 80:23 hearing 3:1,1,5,9 3:11 38:2,3 heels 11:7 held 47:10 help 70:22 helpful 70:21 here's 58:23 hey 51:16 60:19 he's 32:18 41:24 78:19,20,20 high 81:20 highly 30:6,15 history 26:5 hit 59:11 hmm 10:5 17:13 hold 43:17 57:20 59:3 79:15 holdings 27:1 home 59:11 hon 2:22 honestly 24:6 honor 6:4,8,11,25 7:8,14,19,24 8:3 8:16 9:10,12,16 10:9,14,24 11:5 11:17,18,21,23 12:9,9,15,17,22 13:3,12,22 14:5 14:18 15:17 16:11 17:6 30:2,6,12 32:11,21,22 33:1 34:8 35:11,14 36:4,9,16,23 37:7	37:11,14,23 38:1 38:6,21 39:8 40:16,24 41:1,13 41:19,23 42:5,15 42:22 43:12,16 45:1 46:14,15,20 47:22,24 48:8,14 48:17,18,19 49:15 49:22,23 51:23 52:7,18 53:24 54:12,18,24 55:9 55:15 56:10,16,19 56:25 57:2,3,8,10 57:18,19,21 58:8 58:13 59:17 60:1 60:4 61:9,19 62:2 62:18,19 63:4,23 64:3,16,21 65:1 68:25 69:7,16 70:14,25 71:7,9 71:14,17,19,20 72:12,16 73:19 75:6 76:14,20,22 77:13,20 78:6 79:5,6,11 80:5,20 81:12 83:13,14 honor's 6:18 52:8 69:10 hope 69:15 hoped 72:13 hostetler 4:3 6:5 house 56:6 hyde 3:25 85:3,8 i idea 60:4 idiotic 20:10 ignored 11:8 ignoring 13:5 illustrative 9:7 implemented 13:3 implicate 45:16 implicated 41:17 45:5	important 15:21 28:20 44:2 50:13 58:7,9 impose 21:25 47:4 impossible 31:19 impression 69:18 improper 8:8 57:7 67:4,5 inability 22:16 inappropriate 15:15 incarcerated 76:23 77:10 78:14 78:19 include 39:15 58:14 included 12:19 31:14 including 14:13 72:16 inconsistent 11:24 13:5 increased 23:16 incurred 11:2 indicated 57:24 75:6 indiscernible 17:3 17:4 37:20,22 61:14 individual 77:8,9 individually 73:25 ineffective 14:25 inefficient 15:24 inextricably 12:21 13:20 15:19 17:9 18:10 37:9 information 60:20 initial 35:5 initiated 17:2 initiates 42:4 ins 36:8 45:22 48:14 68:6	insurance 23:9 31:8 inter 38:24,25 interaccount 26:19 interest 36:18 54:1,6 interpreted 44:22 interrupt 64:12 intertwined 12:21 13:20 15:20 37:10 46:11 intimately 11:17 12:9 investment 1:12 1:20 2:7 22:15 26:14 38:14 39:13 investor 1:9 4:19 16:16 invoke 15:11 64:21 invoked 16:17 41:17 64:18 involve 25:25 26:1 involved 27:15 30:9 involves 24:10 irrelevant 81:10 81:11 irrevocably 25:24 irving 1:19 2:5 island 78:21 isn't 25:4 31:14 69:20 81:7 issuance 26:14 issue 7:11 10:4 14:6 16:20 17:4 17:11,12 22:14,18 22:20 26:16,19 29:12 33:4,4,9,25 34:5,6 35:15,17 36:1,2 37:8 38:17 38:24 39:2,7,12
---	--	---	---

[issue - lax]

Page 10

39:23 41:3 42:3,8 42:10 43:14,18 44:4,24 47:13,17 48:22 49:21,21 50:3 51:25,25 52:12 53:10 55:21 59:6,15 60:18 62:13,21,24 65:18 66:1 69:2,19,23 70:3,3,19 74:9 76:1,9 81:3 82:3 issued 11:9 54:5 issues 12:15,16,20 14:24 15:24 19:24 22:3 26:24 33:19 36:10,15,19 38:3 38:8,22 39:13,15 39:15 46:11 47:2 47:10 49:19,20 50:1 53:22 54:12 59:9 62:10,11 65:18 68:2,3,3 70:2,4,9 71:25 75:24 it'd 81:12 it'll 59:12 it's 12:4 14:14 15:12,20 16:2 17:12,18 21:3,5,6 25:2,4,18 28:20 30:6,15 31:7,19 34:16,16 36:25 38:18 39:5 41:7 41:21 43:5 44:6 44:13 45:2,8 48:13 49:3,6,20 49:21 52:1 54:10 54:20 58:7,9,11 64:6,23 65:9,10 67:3,4,5 68:15 69:22 75:17 78:11 78:15 80:9 81:7 81:10,20	i'd 7:20 17:1 28:9 35:3 36:2 40:15 42:8 53:25 58:13 76:16 i'll 8:11 14:20 16:16 43:17 44:23 52:16 55:17 59:16 61:5 62:8,9 63:15 64:5,11 76:6 i'm 7:18 9:15 10:20 11:16 16:15 16:22 17:8 23:10 24:13,19 25:12 28:12,16,23 31:9 32:12 33:13 37:11 39:8,17 47:24 50:19,25 52:19,19 54:23,25 55:2,16 55:24 56:14 58:23 58:24 59:2,4,8 60:13,24 62:12 64:13,20 65:2,3 66:16 67:25 79:4 81:25 82:1 i've 15:19 25:10 28:8 30:11 32:9 34:5 40:7 55:6 56:5,11 65:7 81:3 82:3	13:4,21 14:23 16:5,21 17:17 25:14,16 33:10 34:4 35:4,25 38:9 38:19 39:6 43:23 47:9 54:4,7 55:19 56:19 57:4,17 58:2,7,12,22 59:1 59:2 60:18 62:24 64:6 69:17,20 70:2 judging 79:18 judgment 7:3 29:1,17 45:25 judicata 22:3 47:12 48:6 july 11:11 june 9:17 11:10 11:10 jurisdiction 10:4 11:13 12:6 13:16 15:12 20:16 21:11 21:15 24:9 25:24 27:9,14 33:5,7,8 33:18,19,23 34:2 34:3 35:25 39:14 39:25 40:2,3,4,6,8 40:10 42:11 43:8 43:13 44:6 50:5,6 50:21,23,25 51:25 69:5 jurisdictional 39:23 62:11 65:25 69:2 jury 7:22 62:21 63:8,10 justify 23:6	kevin 5:15 kind 52:1 know 10:1,20,23 11:16 12:1,9 13:21 16:1 18:13 18:19 21:3,5 22:10,13,19,19 23:11,23 24:6,12 25:17 26:17 28:14 31:16 33:20,21 36:24 37:3 39:2 40:7 43:22,22 46:13 47:1,19,21 48:4 49:8,9 50:10 51:8,16 54:23 55:22 56:3 58:8,9 59:13 60:13 61:16 65:16,22 67:13 70:16 75:14,18,20 78:23 80:13,21 81:3,21 82:3,21 knowledge 79:18 konigsberg 78:12 kugel 78:16,18
			I
			I 1:12,19 2:6,8 l.p. 1:23 lack 10:4 law 13:6,14 15:11 18:7,8 21:11 22:18 25:23 30:4 44:10 50:19,20 lawrence 9:9 42:23 52:21 54:4 lawsuit 30:8 lax 5:7,11 71:19 71:19 77:19,23,25 78:16 79:4,10 keep 16:1 38:5 67:21 Kelley 4:23 6:7 16:15,15,24

[lay - months]

Page 11

lay 33:21	listing 67:2	looks 33:21	23:9 35:15 41:2
lead 1:3 19:19	lists 61:12	loose 61:17	43:13 44:23 45:17
leads 10:3	litigant 30:7,16	loser 9:2 10:18	51:25 54:14 63:12
leaf 61:17	31:24	28:16 59:12	78:2
learn 60:15	litigant's 30:7	losers 9:6 51:19	means 23:5 66:8
learning 60:12	litigating 26:18,20	loss 73:9	66:11
leave 8:10 65:14	litigation 11:3	lot 13:13 22:13	meant 53:14
ledanski 3:25 85:3	22:6 26:15 38:23	28:8 49:20 55:11	mediation 37:17
85:8	43:24 75:15	69:18 72:16	61:1
left 27:2,20 74:21	little 16:19 33:2	lp 6:12	meet 41:3 81:21
legal 12:15 22:14	50:7 54:10,10	m	meeting 55:23
26:24 36:10 46:23	69:18 82:21	m 2:22 5:5	memorialized
64:22 65:17 68:2	live 11:15 22:18	madoff 1:12,20	69:10
68:3 85:20	22:20 34:17 54:9	2:7,8 6:3 45:12	mentioned 34:4
legitimate 45:7	55:7 58:1 59:9	51:17 58:16	39:24 62:15
lehman 34:10,11	60:17 66:1,2 70:2	magistrate 43:23	mentions 27:5
letter 28:2 48:20	70:3,5,8,12	main 21:13	merits 48:5
56:12,17 70:13,15	lives 78:21	making 31:7 33:1	met 8:25 41:21
71:2	living 17:8	58:19	63:21
letters 61:18	llc 1:12,20 2:7	managed 79:13	metaphor 24:20
let's 30:25 42:8,9	llp 4:13 5:1,7 30:5	management 80:2	method 22:15
65:3,14 70:11	30:6	mandamus 62:20	michael 6:12
73:3	loan 80:10,14	62:22	militate 10:21
level 29:9	82:15	manhattan 80:14	militates 54:6
liability 12:21	local 78:20	mann 6:10,12	miller 5:12 71:17
13:21,23 15:20	logic 63:24	35:4,9 36:2 37:8	71:18 76:14
16:7	long 44:4 59:23	39:16 42:18 55:9	mine 69:13
life 36:17	60:2 66:1 71:22	55:20	mineola 85:23
limitations 36:17	78:21 79:14,20	matter 1:7,17 2:3	minimum 70:11
limited 78:17	longer 14:2 43:7	7:15,16 8:2 14:9	ministerial 14:14
line 40:2,5 84:4	49:9 70:5 82:10	14:13,15 17:2	66:24 67:3
link 24:4,25	82:15	18:6 29:16 30:24	minute 60:20
linked 17:10	look 8:22 10:23	40:4,11 41:14,21	missed 24:23
18:10	13:8 14:10 15:21	42:4 43:9 50:18	missing 23:1
lippman 35:25	16:2,4 18:10 25:1	50:20 57:3,21	55:20
38:9 39:6	28:10 31:17,24	58:12 64:2,19	misspoke 9:16
lippman's 35:5	32:24 47:6 48:15	65:10,10,12 67:12	mm 10:5 17:13
38:19	56:14 57:22 60:17	68:20 69:12	mohan 5:16
liquidation 1:19	75:18 81:9	matters 6:8 61:21	moment 12:9
2:6 11:6 16:19	looked 8:23 28:8	matthew 2:25	monday 61:6
list 52:23	40:12	maytal 4:9 6:6	month 55:25
listed 22:5	looking 74:1	mean 12:2 15:13	months 9:21
	81:11	16:11 18:9 22:4	10:15 72:1,15,23

[months - october]

Page 12

72:24,24 73:20 74:20,20 moot 54:13 62:15 moots 82:11 morgan 80:8 82:7 morning 6:2,4,9 17:6 30:2,3 mortgage 80:10 80:14 moss 55:19 56:19 57:4,17 58:2,7,12 58:23 59:1,2 60:18 69:17,20 70:2 motion 3:5 6:17 6:22,23 7:10,13 7:20 8:1,3,7 9:9 9:17,19 10:14,22 10:25 15:3 18:20 20:10 21:7 24:4 26:4 27:4,8 34:25 36:25 40:21 41:4 45:25 50:15 52:5 53:11,21 54:2,12 55:3,11 59:5,6,7 60:24 61:23,25 62:9,11,12,15 63:15,21 64:1,3,5 64:24 65:6,8,13 65:19,24,24 66:4 66:21,25 68:18,21 69:2 72:13 76:11 76:22 77:14,19 81:25 84:6 motions 12:18 37:16 63:17 move 37:13 42:17 42:19 57:25 60:5 61:6 76:16 80:11 80:16 83:3 moved 28:25 29:16 37:18	moving 36:22 71:24 72:24 n n 4:1 6:1 84:1 85:1 n.w. 4:20 names 79:13 narrowed 72:15 nathanael 4:23 6:7 16:15 nauseam 18:2 necessarily 45:10 need 8:15 31:15 39:23 50:14 51:4 53:2 56:15 73:4 needs 54:5 nelson 54:3 nelsons 9:10 42:23 52:22 net 9:2,5 10:17 17:12,20 18:6 22:14 23:6 26:14 26:14,14 28:16 34:18 35:19 36:1 38:14 39:12 46:12 47:15,15 48:2 51:19 59:12 66:6 68:2,5 netting 36:17 never 10:16 23:16 37:18 41:5 43:2 58:5 neville 4:17 5:7 17:6,7,13,16,22 17:24 18:8,21,23 19:1,4,10,16,20 19:23 20:6,9,14 20:17,20 21:4,6 21:17,23 22:1,8 22:11,22,25 23:13 23:15,21,25 24:3 24:10,14,17,21 25:8,10,16,19	26:12,21 27:1,10 27:13,18,20,25 28:6,9,17,19,23 29:4,8,15,22 34:8 34:15,19,23 35:3 35:8,12,16,21,23 37:20,22 38:2,7 38:11,20,25 39:5 40:15,17,20 41:9 42:5,13,18 43:20 44:1,3,8,16 45:1,3 45:10,13,19,22 46:2,4,13,15,17 47:1,6 48:13,19 48:24 49:2,6,11 49:22,25 50:7,10 50:16,18 51:2,7 51:11,14 52:2 53:5,13,17,20 54:20 55:8,14,18 55:25 56:3,8,11 56:17,24 57:8,18 57:24 58:4,13,21 60:4,7,11,21 61:8 61:13 63:25 66:10 66:14,16,19 67:2 67:5,10,12,14,24 68:9,10,12,15,22 69:6,13 71:9 neville's 41:16 new 1:2 2:17 4:6 4:15 5:3,9 48:24 49:3,9 nicholas 4:8 6:4 night 80:9 82:21 nine 15:9 19:21 nobody's 39:17 52:13 53:11 non 31:19 81:5 normally 18:21 note 12:17 notice 63:18	noticed 28:7 notices 3:5,6 63:18 notwithstanding 22:14 nullity 63:19 65:6 68:20 number 9:2 13:12 14:8 75:6 78:17 numbers 61:16 ny 2:17 4:6,15 5:3 5:9 85:23 o o 2:21 6:1 85:1 object 52:3,4,4 81:4,15 objection 3:6 7:17 14:3,9,11 19:11 19:14,17,18,25 20:21 22:3 29:10 29:13 36:2,6,11 36:16 39:16 40:21 41:8,16,25 42:3 43:6 53:1 65:5,9 66:2,5 67:9,19 68:19,22,23 77:18 81:6 objections 6:19,20 8:4,14 11:15 12:10 15:3,22 17:1,2 20:7 26:22 27:6 28:21 32:23 37:2 40:23 41:12 63:25 64:16 66:22 80:9 82:21 obviously 39:3 63:21 82:10 occur 14:22 23:23 occurred 11:10 18:18 34:14 occurs 10:9 october 3:2 9:12 62:5 77:17
---	---	---	--

[offhand - prejudgment]

Page 13

offhand 32:13	80:2	participation 39:3	plaintiff's 11:3
office 69:18	ordinary 30:25	44:20	plan 38:8 44:17
oh 29:22 49:11	45:11 64:9	79:21	80:11
51:11 53:16	outcome 66:16	particularly	plaza 4:5
okay 13:25 14:5	outs 36:8 45:23	39:16	pleading 65:10
14:21 16:9 17:23	48:14 68:6	parties 19:8 47:18	please 6:2 29:22
19:17 22:24 24:2	outset 82:7	party 80:17 81:4	plenty 61:6
25:10 27:7 28:8	outside 36:1	81:5,7,17	plus 15:9
28:22 29:25 32:11	outstanding 80:6	passed 14:22	pm 83:17
39:20 41:15 42:14	82:16	15:25	point 7:21 8:16
43:14 44:8 45:5	overcharge 79:8	patrick 5:16	15:17,21 17:1
45:15,24 48:14,15	overlap 25:6	payments 28:11	18:3 19:20 21:7
49:17 51:22 55:8	p	pending 6:19 7:16	24:23 31:23 33:13
56:9,22 60:6	p 4:1,1 6:1	33:14,23 35:3	33:14,23 35:3
62:17 63:2 66:18	p.m. 71:6	36:7,14 46:17	36:7,14 46:17
68:16,24 69:24	pacific 6:7	49:1,5 66:20 75:5	49:1,5 66:20 75:5
70:12,13,17,20,23	page 49:9 84:4	pointed 36:4	pointed 36:4
71:3,5 76:8,12	pages 40:13 42:14	39:12	pomona 55:19
77:10,25 78:5	48:21,22 49:16	ponzi 18:1 45:2,3	ponzi 18:1 45:2,3
79:20 80:4,25	51:22	45:6,11 46:6	45:6,11 46:6
81:20,22 82:2,5	paper 69:18	51:18 55:23 68:7	51:18 55:23 68:7
83:6,11,15	papers 15:18	pool 23:16	pool 23:16
old 17:25 33:14	41:20 48:8 64:3	portfolio 79:12	portfolio 79:12
85:21	69:20 70:8,11	portions 35:24	portions 35:24
omnibus 12:12	paragraph 14:11	position 45:2	position 45:2
20:21 51:5 66:25	18:20	74:20	74:20
77:17	parallel 17:8	possession 73:11	possession 73:11
once 13:2 38:8	pardon 21:4	possible 64:8	possible 64:8
ones 51:9	37:21	posture 10:11	posture 10:11
open 58:4 73:1,21	park 5:2	potentially 31:25	potentially 31:25
opinion 47:21	part 6:22 28:1	practicing 44:3	practicing 44:3
opportunity	35:12 56:4,15,20	pre 3:9	pre 3:9
15:25 24:24 42:24	58:12 60:19 65:9	precedent 13:5	precedent 13:5
oppose 65:25	67:16 70:8,12	precisely 33:16	precisely 33:16
opposition 52:5	partially 26:8	38:16 41:22 46:20	38:16 41:22 46:20
order 3:1,2 8:10	participant 58:17	50:1	50:1
12:12 15:8 19:13	58:25	precluded 54:13	precluded 54:13
19:18 20:22 31:2	participate 40:17	precludes 9:22	precludes 9:22
31:15 35:5,19,25	51:13 59:13	41:6	41:6
38:19,21 39:5,8	participated 26:6	preclusive 47:17	preclusive 47:17
41:11 42:22 53:16	38:23	prejudgment	prejudgment
57:2 61:10 69:9	participating	36:18 54:1,6	36:18 54:1,6
76:23 77:2,24	51:20		

[prejudice - reconsideration]

Page 14

prejudice 9:1,5 10:2,7 20:4 23:8 24:22 30:8,17 31:4,24,25 32:5 32:16 36:10 45:17 46:21 48:4 63:16 63:21 65:23 66:23 68:20 84:6 prejudiced 30:9 premature 53:6 prepared 37:13 79:22,25 80:1 presumably 23:6 75:1 pretrial 6:9 9:11 42:18 44:23 56:18 62:4 pretty 25:23 28:23 34:15 79:17 prevail 51:18 prevent 33:16 preview 76:22 previously 75:6 principal 8:7 10:18 50:3 51:25 principle 15:11 prior 12:14,18 35:4 privacy 80:17,18 80:19 81:15 probably 26:25 44:4 49:9,24 71:21 79:24 problem 34:21 69:17 73:18 problems 13:12 procedural 8:22 10:11 13:14 63:4 procedurally 8:8 57:7 64:11 67:4,5 procedure 16:18 17:3,9 18:9 19:6 20:1 29:3 34:22	37:16 63:20 67:18 77:11 procedures 15:8 19:13,18 proceed 7:18 proceeding 6:9 17:9,14,25 18:15 24:5,24 33:6 36:12 47:18 50:22 50:23 51:5 57:5 58:12 64:7 66:9 66:23 67:7,8,24 79:18 proceedings 11:19 45:16 83:16 85:4 process 11:1,16 12:8,13 13:9,18 14:2 15:5,9 21:16 21:17 24:5,11,11 25:25 26:2,3 34:12 41:12 42:6 46:10 47:11,14 48:1 66:24 67:16 produce 72:19 82:25 83:2 produced 56:4 72:5,20 74:8 75:6 75:10 production 55:20 72:23 75:8 productions 72:7 profit 36:18 profits 17:11,20 18:7 23:6 68:5 progressed 11:1 proof 27:23 28:14 proofs 28:10 proper 12:19 54:18 property 46:12 propose 6:9 43:15 53:18 59:18 69:24	proposed 49:13 proposition 33:5 proprietary 56:7 prosecuting 12:8 protection 1:9 4:19 16:16 prove 23:3,4,5 provide 9:13 provided 9:16 34:3 80:2 provides 39:24 pure 36:1 purported 63:24 65:5 purpose 21:15 purposes 22:6 33:18 pursuant 37:13 put 6:10 14:24 18:23 27:23 30:25 putting 8:21 57:15,21 64:20 pw 79:18	raise 22:9,13 36:11 53:22 raised 22:13 36:11,17 38:3,8 39:15 43:23 67:19 raises 36:2 rakoff 12:23 13:2 13:21 16:5 17:17 47:9 rationale 32:3 reach 51:1,2 reading 25:7,9 ready 7:4 10:12 60:25 real 24:23 48:20 realize 43:4 really 6:24 7:11 16:21 19:8 24:3 25:19 27:2 34:24 41:5 42:8 62:10 62:16 63:16 66:3 66:7 68:12,12,14 reason 22:9 27:13 33:15,22 39:3 44:18 76:4,5 reasonable 36:20 reasons 8:7 15:4 65:7 rebut 35:14 36:3 recall 9:10 19:13 receive 56:17 received 10:19 49:13 receiverships 18:1 receiving 75:20 75:21 recess 71:11 reciting 17:18 recognized 12:22 reconsideration 9:19 54:12
		q quash 80:11,16 question 7:6,9 10:24 15:6 19:8 20:4,24 21:20,21 26:17 29:11 32:17 32:20 41:1 54:8 73:3 74:18 questions 16:12 72:1,7 73:1,21 74:22 quite 12:3,17 47:23,25 78:12 quo 64:21	q quash 80:11,16 question 7:6,9 10:24 15:6 19:8 20:4,24 21:20,21 26:17 29:11 32:17 32:20 41:1 54:8 73:3 74:18 questions 16:12 72:1,7 73:1,21 74:22 quite 12:3,17 47:23,25 78:12 quo 64:21
		r r 2:21 4:1 5:11 6:1 85:1 race 22:2 radar 77:15	r r 2:21 4:1 5:11 6:1 85:1 race 22:2 radar 77:15

[reconstructed - run]

Page 15

reconstructed	represented	responses	rockefeller
78:25	30:5 51:9	80:9 responsive	4:5 rollinson
record	request	72:5 72:17 73:5 74:3	71:14,15,20 72:10
53:25 85:4	58:5 72:6 73:6	74:24 75:4 82:9	73:7,15,18,23
records	requests	82:10	74:2,13,19 75:3
53:21 56:19 70:3,6	53:9 58:15,18 72:14,15	rest	75:11,22 76:8,12
81:13,14	72:20 75:17	resubmit	76:18 77:1,4,8,13
reference	require	70:10	77:17 78:1,4,6,10
7:13 10:14 37:19 42:19	64:12	result	78:17,20 79:2,11
55:4,5 57:25 59:5	requires	9:1 15:15 46:24 51:1 54:19	79:19,23 80:23
60:5,25 61:7	57:2	retained	81:1,23 82:6,13
62:12	res	35:25 39:13,14	82:17,20,24 83:5
references	research	retrieve	83:11,13
54:2	33:3	70:9	roman
referred	reset	returnable	49:3,6
57:4 58:2 70:4	64:2	77:16	room
referring	resolution	returned	57:13
30:12 35:16,18	9:24 12:20 13:9,18,20	69:21	route
regarding	14:2 17:14 19:6	reviewed	66:3
16:24 16:25 60:18	21:16,17 22:14	ridiculous	rug
rejection	27:15 33:24 34:12	26:7	50:7
44:17	67:16	right	rule
related	resolve	7:4,22,23 13:19 17:5 18:16	8:9,14,22,24
21:18 26:16 38:23 44:19	10:17 12:25 15:24 16:6	19:15,16 20:12	8:24 14:25 17:3
72:21	18:12,14 30:19	21:2 23:2,14,21	25:12 29:5,6,14
relates	37:8,15 50:17	24:21 27:24 28:15	29:15 30:21,22,25
relating	65:25 70:18,22	28:22,25 29:17	31:5,6,10,14,17
22:3,16 54:9 73:12	resolved	31:4,11,12,13	32:3 33:14,15,15
relevance	11:22 12:16 16:2 18:22	32:12,14,15 34:24	34:6 41:2,9,11,13
80:13 80:20	21:21 22:18 26:18	35:10 38:10 39:1	41:17 44:11,15,16
relevant	26:20 71:4	41:24 42:12 43:14	44:18,22 49:13,21
6:16 81:18	resolves	44:12,14,19 45:7	54:13 57:9 64:6
relief	39:11 48:1	45:13,14,24 48:15	64:17,18,25 65:7
23:23	resolving	50:16 54:16 55:5	65:13 68:23 75:7
remain	25:20 25:21	56:2,8 61:5,15	76:23,25
15:1,1 63:24	resources	62:1,8,16,23 63:1	ruled
remaining	72:16	63:8,10,13,15	7:17 14:24
12:15 13:9 47:3	respect	66:7 68:20 69:1	63:11 67:19
remember	20:10 52:21 55:20 59:6	70:9 71:8,12 72:8	rules
79:6	65:6,9 76:9	76:13 77:21 78:7	16:18 29:2
remove	respectfully	78:22 79:1 80:6	49:9
27:3	11:23	81:15,16 83:3,4	ruling
rendered	respond	rights	33:1 54:15
11:18	70:16 72:6	14:12 23:9	69:10 76:6
renders	responded	65:23,24	rulings
14:25	35:15	road	19:24
rephrase	response	72:1 73:20	20:20,23 26:21
46:18	11:14 26:8 69:2 72:19	74:20 85:21	84:3
reply	81:6,10	robert	run
41:25		5:12 71:17	59:11
reporter			
33:12			
reports			
79:21			

[s - story]

Page 16

s	secondly 72:10 73:8 securities 1:9,12 1:20 2:7 4:19 16:16 51:18 see 38:4 43:17 45:19 48:22 51:14 56:19 63:3 64:1 81:24 seek 61:22 seeking 23:24 37:1 39:22 51:5 54:1 56:18 61:21 74:12 77:1 seen 30:11 34:5 42:19 55:6 sees 7:19 segal 15:2 semantical 41:7 sense 49:15 74:10 sensible 74:14 separate 10:4 21:18 76:11 77:11 separated 24:6,8 61:17,18 separately 15:25 separation 24:23 september 2:19 9:20 85:25 seriatim 10:16 series 22:16 serrao 5:18 serve 58:6 served 80:1 seven 58:6 seventh 63:7,9 shapiro 2:11 71:13 72:18 shapiro's 72:18 80:10 sheehan 5:17 she's 57:24 58:3 64:13,15,23 77:6	77:10 shouldn't 26:6 57:20 74:17 show 3:1 side 16:14 sides 17:16 19:8 46:25 66:13 signed 57:3 significant 9:22 10:8 12:7 silliest 32:8 similar 40:25 46:11 similarly 46:13 simple 69:15 simply 15:7 21:22 31:1 single 32:24 48:21 sipa 2:6 16:19 sipc 23:9 25:13 30:23 31:8,9 sir 16:14 sitting 20:9 situation 31:1 40:9 42:20 72:1 72:13 75:23 slew 25:11 50:11 smb 1:3 solely 38:23 solutions 85:20 somebody 33:16 81:8 son 72:19 sonya 3:25 85:3,8 soon 60:8 sorry 8:19,19 9:15 37:11 46:4 55:24 62:12 sort 73:24 79:25 sought 12:14 sounds 45:15 48:23 51:21 58:11	southern 1:2 spaced 48:21 speak 55:17 specifically 12:24 14:12 28:2 35:25 39:24 41:20 58:17 split 79:6 splitting 19:3 spoliation 74:7 76:10 stack 76:3 stand 15:10 standard 8:25 18:2,12 41:3 standing 80:16 81:4 stanley 75:9,20 80:10 start 11:5 33:10 37:10 started 37:10 state 16:17 stated 65:7 statement 38:15 39:12 73:24 statements 73:11 75:19 76:3 states 1:1 2:15 status 64:21 83:7 statute 36:17 stayed 43:2 stern 47:10 stipulate 22:17,22 59:1 stipulated 22:19 36:8 57:16 58:22 stipulation 37:15 57:3 77:23 stop 13:7 33:3 storage 69:23 70:19 story 17:24
s 4:1,23 6:1 sarah 52:21 54:3 saran 9:9 satellite 75:15 saw 38:2 saying 14:1 16:1,2 16:9 21:1 28:12 28:13,14 29:9 30:17 33:1 36:5 38:5,13,18 41:9 46:2 47:16 48:19 50:19 51:16 60:19 64:6 65:3 67:3 68:4,8 81:7,8,25 says 13:15 18:13 29:15 31:5,20 41:10 42:18 44:16 47:25 67:24 scanned 57:13,13 scenario 20:5 schedule 37:3,5 52:17 53:12 55:3 58:24 59:4,16 60:24 61:5 76:16 83:6 scheduled 9:12,12 42:24 62:5 scheduling 7:21 73:19 76:20 scheme 18:1 45:2 45:3,6,11 46:6 51:18 55:23 68:7 scrutinize 30:16 searched 72:4 73:8 seated 6:2 second 8:2,11 9:3 19:5,23 21:11 24:7 25:22,23 26:22 51:25 57:19 62:20,22 63:10,15 67:15,20 70:1			

[strategy - think]

Page 17

strategy 79:7 street 4:20 stricken 15:16 strike 3:5 8:3 40:21 79:7 84:6 striking 40:22 stripping 33:17 stuart 2:22 stuff 81:9 subject 9:9 15:3 40:4 71:21 submit 11:12,24 13:4,15 14:21 15:14 49:23 58:7 59:1 61:10 69:9 70:13,15 77:22 submits 8:6 21:14 submitted 13:15 subpoena 80:6,11 80:17 81:5,13 82:9,14 subpoenaed 81:7 subsequent 33:6 38:23 substance 32:4 substantively 2:5 suddenly 60:14,19 sued 32:1 sufficient 9:16 suggesting 65:2 suggestion 43:6 suggests 32:14 suit 10:25 suitable 15:12 suite 4:20 85:22 summary 7:3 29:1 29:16 33:18 45:25 supplemental 52:23 57:9 supply 40:13 69:22 support 33:1	suppose 14:18 23:3 supposed 64:7 supreme 63:11 sure 8:2 14:7 16:24 24:13,19 25:12 28:24 32:12 52:19 66:16 72:10 74:2 78:12 81:2 surprise 71:1 surprised 16:20 75:4	term 79:14 termination 65:11 terms 44:11 65:17 65:20,20 66:8 68:18 78:22 testify 78:25 testifying 59:18 59:21 testimony 77:3 thank 48:17,18 51:23 61:9 62:18 68:25 70:25 71:7 71:9,10,19 83:14 83:15 t tab 85:1,1 tabs 61:18 tail 6:24 take 59:24 60:3 73:13 74:10 75:15 76:5,7,10 77:11 79:3,4 taken 45:1 75:14 talk 49:19 66:8 79:15 talked 54:13 talking 33:20 55:2 66:7 73:19 78:11 78:13,14 talks 44:10,16 tangent 50:13 tangentially 21:19 team 59:22 technically 78:23 tee 55:2 64:11 telephonically 5:14 tell 7:25 22:12 23:19 43:1 49:8 69:25 70:1 72:9 74:8 76:15 telling 7:2 37:1 38:11 60:13 ten 11:6 42:14	20:15 21:2,2 25:6 27:11 32:24 34:9 34:15 38:25 39:3 39:6 43:23 45:24 48:24 52:16,23 53:15 54:8 58:1 59:9,14 60:20 61:13 62:9 65:16 67:20 69:4,19 74:22 76:4,5 78:12 79:25 they'll 8:14 76:24 78:25 they're 8:13 14:1 14:2,3 16:2 19:3 20:21 29:4,9 32:1 36:5,5,6,6,21,25 37:1 46:2,11,21 51:16,20 61:21 65:12 74:7,8 75:23 78:10,23 79:12,24 83:1 they've 30:18,18 37:2 46:7 64:18 thing 17:12 25:22 28:6,17 32:9 44:22 49:25 55:9 55:23 64:24 81:1 81:12,23 82:6 things 9:1 22:15 26:17,19 28:4,19 36:24 58:14 60:12 67:19 think 6:16 7:1,8 7:12,12 8:17 9:7 9:22 10:8,20,21 12:1 13:11,22 14:7,19 15:6,10 15:17,20 24:17,17 24:22 25:15 26:4 theory 51:21 there's 7:13,16,21 11:25 12:7 13:8 14:1 17:16 20:12
---	---	--	--

[think - wasn't]

Page 18

34:8 37:7,8,11 39:4,10 40:24 41:5,6,24 42:15 42:17 43:24 44:17 45:13 47:9 49:21 50:14,25 51:4,21 53:2 54:5 58:9 59:11,23 60:2,7 62:14 64:1,3,19 66:10 70:1,12 71:4 72:11 73:4 74:13 75:17 76:21 79:20,23 80:22,23 third 80:17 thought 21:13 38:13 53:20 66:19 71:22 75:9 three 8:7 9:8 19:5 19:24 20:20,22 24:6 26:21 52:20 53:1,8,9,10 59:25 60:10 62:3 63:19 67:2 threshold 33:25 42:7,10 43:13 58:11 81:20 throw 50:7 tie 36:3 time 9:16 14:21 26:16 39:1,25 40:11 42:20 43:4 61:6 80:1 82:4 times 19:5,24 24:7 49:3,6 81:4 timing 12:4 tired 60:13 today 21:8,12 33:13 40:14 62:20 told 60:12 64:13 81:9 ton 76:21 torello 4:10 71:15	total 8:5 39:4 72:20 totally 15:15 50:16 track 21:18 trade 55:21,25 56:4,5,13 57:15 58:5 68:7 trading 45:4 51:17 55:20 56:7 56:19 70:3 transactions 45:7 transcribed 3:25 transcript 85:4 transfer 18:18 26:19 38:24 45:8 transfers 38:25 treasury 51:18 treated 41:4 treating 52:5 trial 3:9 7:4,21,22 9:12 10:12 11:22 37:3,5,8,14 42:24 43:3 47:14 52:17 53:12 55:3,5 57:23 58:24 59:3 59:4,11,16,21,23 60:24,25 61:12,13 62:8,21 63:4,8,10 trials 56:15 tried 7:7 81:13 true 23:25 30:20 41:18 66:14 85:4 trustee 1:19 2:5 4:4 6:6 8:6 12:11 12:13,24 23:3 27:21 32:18 54:1 54:20 55:11 56:3 57:22 68:6 71:15 77:1,4 80:6 trustee's 6:20 8:3 10:22 19:14 22:5 23:2 28:2 29:19	34:18,24 48:1 72:5 try 7:23 10:6 20:16 48:11,12 76:17 trying 39:17 58:7 64:13,15,20 66:3 81:23 82:7 turn 59:12 74:16 74:24 turned 38:4 76:4 turns 76:2 twelve 49:1 twice 7:18 13:3 two 6:8 12:1 17:16 34:9 36:24 40:13 42:12,13 51:10,22 57:6 59:25 61:1 66:13 72:14,23 73:20 74:20,20 type 49:1	unique 44:2 united 1:1 2:15 universe 17:8 unusual 30:6,15 41:12 use 29:5 61:16,18 usually 32:6 utilized 15:9
			v
			v 1:11,22 2:10 various 26:23 44:11 verify 70:24 veritext 85:20 versus 38:15 39:12 41:7 71:13 victims 9:2 10:18 view 31:7 53:5 65:11 violate 8:9 virtually 72:22
			w
			wagging 6:24 wait 60:20 77:6 waiting 12:25 38:4 walsh's 33:10 34:4 want 14:12 27:23 31:3 42:12 43:17 48:9,12 51:13 52:18 59:8,10 66:4 68:10,11 71:24 72:3 73:22 73:24 74:19 76:10 76:16 79:3 82:8 wanted 36:3 51:14 wants 42:19 washington 4:21 wasn't 9:17 24:21 31:16 45:6 51:18 57:4 58:20 68:7

[waste - zero]

Page 19

waste	72:16	willing	23:18	53:1,9	63:25	58:24,25	60:10,10
way	6:11 10:9		27:24	56:14		60:13,14,23,23,23	
	12:10 28:4 33:11	win	18:16	14:3,14	19:7,9	61:1	72:14 75:1
	36:9 37:9 38:20	wind	51:19	20:4,8	27:16	yep	83:9
	52:11 55:2 57:24	withdraw	6:23,23	28:13	33:17,22	yesterday	56:18
	57:25 65:3,22		7:13 8:14	36:7	40:18 42:9	york	1:2 2:17 4:6
	66:3		10:3,14	13:8	15:7		4:15 5:3,9
ways	14:8		16:25	19:10,22		younger	72:19
week	12:11 59:22		20:3,6	21:22,24		you'd	16:12 76:11
	61:3,12		23:8	24:22	26:7	you'll	12:17 40:9
weeks	40:13 42:12		27:4	28:25	29:17		59:11,12 61:22
	42:13 51:22		31:1,3,13	32:4,15		you're	7:2 16:9
went	19:4 54:7		32:18,23	34:25			20:4,8,25 21:1
	67:15		35:6	36:5,6,10,21			23:23,24 27:16
weren't	72:13		36:22	37:1,18			28:13,13,14 29:12
	76:4		38:3	39:18,23			31:3,7 33:8,16,20
we'll	45:19 51:19		40:10	41:5,10			33:22 34:17 35:18
	51:19 54:14 61:23		42:12,19	43:9			38:18 40:18 42:8
	61:25 62:19 76:1		44:5,12,14	45:17			45:13,17 47:16
	78:6 82:25 83:3		46:21	48:3,4,9			48:10 53:22 58:12
we're	6:17 11:6		51:5	52:5	53:21		58:25 59:13 60:19
	11:19 13:8 16:9		54:2	55:4	57:25		60:19 66:3,7 67:3
	18:11,14 23:12		59:5,7,10	60:5,25			67:23 68:1,4,8
	25:21 30:17 32:22		61:7,21,22	62:9			73:25 74:10,11
	35:15 37:11,12,14		62:12,13	63:17,22			75:11,15
	50:12 53:1 55:2		64:13,15,24,25				you've
	60:12 61:3 65:4		65:5,19,21,24,24				13:15 16:2
	66:15 69:8 70:22		66:4,21	68:19,21			23:11 44:3 63:21
	71:20,23,25 72:14		68:21	69:3	82:13		73:5
	73:20,20 75:23,24	withdrawal	3:6,6				z
	77:14,19 78:14		8:24	11:6	12:2,5		
	81:23 82:6,6,13		14:17	19:18	25:1	zagano	9:4 10:21
we've	15:9 18:2		27:6	28:20	29:13		10:23 32:24 33:20
	57:11 59:17 60:14		30:7,16	33:25			43:11,14
	64:1 75:1		34:1	36:18	40:1	zero	16:3
what'd	75:18		40:23	41:4,6,11			
what's	9:5 10:2,7		47:5	50:4,5,20			
	10:7,10 15:14		54:15	59:9	62:4		
	24:12 27:20 29:12		63:16,19				
	40:22 57:13,13	withdrawals	8:4,8				
	66:22 69:19 70:24		14:25	22:4,17,20			
who's	76:23		22:22	23:4	27:22		
			28:3	47:15,16			